TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 214.

FRED C. FISHER AND CHARLES C. COHN, ON BEHALF OF FELIX BARCELON, PLAINTIFFS IN ERROR,

vs.

COLONEL DAVID J. BAKER, JR., AND CAPTAIN JOHN DOE THOMPSON.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

FILED MARCH 1, 1906.

(20,111.)

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INDEX.

	Original.	Print.
Petition for writ of *habeas corpus*	1	1
Preliminary investigation in court of first instance	4	3
Testimony of Felix Barcelon	4	3
Order to show cause	13	8
Answer of respondents	14	9
Exhibit A—Excerpt from the minutes of the Philippine Commission of January 31, 1905	18	10
B—Executive order No. 6, January 31, 1905	19	11
C—Telegram from Aguilera, governor, to Assistant Attorney General Harvey, August 4, 1905	20	12
Telegram from Thompson to Harvey, Attorney General, August 7, 1905	21	12
Telegram from Escribano to Harvey, fiscal general, August 7, 1905	22	12
D—Declaration of Felix Barcelon	23	13
F—Testimony of Felix Barcelon	26	14
Reply to answer showing authority to make application	38	21
Opinion by Johnson, J.	40	22
Dissenting opinion by Willard, J.	73	42

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	Original.	Print.
Exception to judgment	77	44
Petition for writ of error	79	45
Assignment of errors	80	46
Writ of error	82	47
Citation and service	84	48
Bond on writ of error	85	48
Stipulation as to making up record	87	50
Stipulation as to record	88	50
Clerk's certificate and return to writ of error	89	51

1 UNITED STATES OF AMERICA, *Philippine Islands.*

In the Supreme Court of the Philippine Islands.

In the Matter of the Application for Writ of *Habeas Corpus* on Behalf of FELIX BARCELON.

Now comes Fred C. Fisher and Charles C. Cohn on behalf of the above named Felix Barcelon and respectfully show to the Honorable Court:

I.

That said Felix Barcelon is detained and restrained of his liberty at the town of Batangas, Province of Batangas, Philippine Islands.

II.

That the person by whom the said Felix Barcelon is so detained and restrained of his liberty is John Doe Thompson, Captain of Philippines Constabulary, acting under and in pursuance of the orders of David J. Baker, Jr., Colonel of Philippines Constabulary.

III.

That the detention and restraint of the said Felix Barcelon is wholly without legal authority therefor, as more fully appears from the recital of the causes of said detention, which are as follows:

On the 19th day of April, 1905, in the Court of First Instance of the Province of Batangas, P. I., at the hearing of the preliminary investigation in the cause of the United States *vs.* Pedro A. Roxas, then pending before said court at a regular session thereof, the said Felix Barcelon was duly called, sworn and examined as a
2 witness for the prosecution in said cause. That immediately after the conclusion of said examination of said Felix Barcelon as such witness, as aforesaid, the person of said Felix Barcelon was ordered by said court of First Instance of the Province of Batangas into the custody of the sheriff of said province, under and by virtue of the provisions of section 39 of General Order No. 58: thereafter, to-wit, on the 22nd day of April, 1905, upon the conclusion of said preliminary investigation the said Felix Barcelon was ordered released and liberated of all restraint by said Court of First Instance. That thereupon the said Felix Barcelon was liberated and released of all restraint. That immediately thereafter the said Felix Barcelon was unlawfully detained and restrained of his liberty by orders of David J. Baker, Jr., Colonel of Philippines Constabulary, and the said Felix Barcelon has ever since continued to be and now is detained and restrained of his liberty under and by virtue of such orders aforesaid.

That a copy of the declaration of the said Felix Barcelon at said preliminary examination above referred to is hereto annexed and made a part hereof. That petitioners are informed and verily be-

lieve that the sole and only cause and motive of the detention and restraint of the said Felix Barcelon is the desire to cause and persuade the said Filix Barcelon to retract the statements contained in said declaration hereto annexed and to declare to the contrary thereof.

IV.

That the detention and restraint of said Felix Barcelon is not under or by virtue of any process issued by any Court or Magistrate, nor by virtue of any judgment or order of any Court of Record, nor of any Court, nor of any Magistrate whatsoever.

V.

That there has not existed during any of the times in this petition mentioned, and there does not now exist, in the said Prov-
3 ince of Batangas, P. I., nor in any part thereof, rebellion, insurrection, or invasion, nor any of them in any form or degree; and that all of the courts of law organized and provided by law for the Province of Batangas have been, at all of the times hereinabove mentioned, in the full and complete exercise of their functions without interruption of any nature or kind.

Wherefore your petitioners pray that a writ of *habeas corpus* be issued requiring the said John Doe Thompson, Captain of Philippines Constabulary, and David J. Baker, Jr., Colonel of Philippines Constabulary, to bring before this honorable court the person of said Felix Barcelon, and that after full hearing in accordance with law the said Felix Barcelon be liberated and released from all restraint and detention, and that respondents be enjoined from any and all interference with the personal liberty of said Felix Barcelon, and that costs of suit be taxed against said respondents.

Manila, August 2, 1905.

(S'g'd) FRED C. FISHER.
(S'g'd) CHARLES C. COHN.

UNITED STATES OF AMERICA,
Philippine Islands, City of Manila, ss:

Fred C. Fisher and Charles C. Cohn, being duly sworn, each for himself and not one for the other, deposes and says that he has read the foregoing petition and knows the contents thereof; that all the facts therein stated upon the knowledge of the affiant are true and that as to the facts averred upon information and belief affiant verily believes them to be true.

(S'g'd) F. C. FISHER.
(S'g'd) CHARLES C. COHN.

Signed and sworn to before me this 2d day of August, 1905. Fred C. Fisher exhibited to me his certificate of registration No. A20345 issued in Manila the 3d day of February 1905 and Charles C. Cohn his certificate of registration No. 207777 issued in Manila the 31st day of July, 1905.

(S'g'd) J. E. BLANCO,
Clerk of the Supreme Court of the P. I.,
Ex-officio Notary Public.

Filed in the clerk's office of the Supreme Court of the Philippine Islands this 2 day of Aug., 1905, 11.46 a. m.
(Stamp Sig.) J. E. BLANCO,
(S'g'd) By H. D. McGEORGE, *Deputy*.

4 UNITED STATES OF AMERICA, *Philippine Islands.*

In the Court of First Instance of the Province of Batangas.

Preliminary Investigation.

THE UNITED STATES, Complainant,
vs.
D. PEDRO A. ROXAS, Accused.

Questions by Attorney General Harvey.

Testimony of Witness Felix Barcelon.

Direct examination by Ass't Attorney General HARVEY:

Q. Where were you born?
A. In Nasugbu, Sir, in the Province of Batangas.
Q. Have you lived continuously in Nasugbu since your birth?
A. Yes, Sir.
Q. What is your occupation?
A. Laborer.
Q. What kind of labor?
A. Cultivating lands.
Q. What lands do you cultivate?
A. Those of Don Pedro Roxas.
Q. Where is the Hacienda in which you have lands to cultivate?
A. In Nasugbu.
Q. Are you a tenant, employee, or in what capacity do you cultivate the lands?
A. I am a tenant.
Q. Do you know Don Pedro A. Roxas, the accused in this case?
5 A. Yes, sir.
Q. How long have you known him?
A. Since he was born, when he came to Nasugbu.
Q. Do you know one Florencio Oliva?
A. Yes, sir.
Q. How long have you known him?
A. Since he has been about Nasugbu.
Q. Do you know how many years, more or less, you have known him?
A. I do not remember, sir.
Q. What is the occupation of Don Florencio Oliva?
A. He is in charge of the Hacienda.
Q. The Hacienda of Nasugbu, or what hacienda.
A. The Hacienda of Nasugbu.

Q. Is he in charge of the Hacienda of the Roxas family or not?
A. The Hacienda of the Roxas family.
Q. Has Don Pedro A. Roxas, the accused in this case, visited this Hacienda or not?
A. Yes, sir.
Q. Do you know one Julian Ramos?
A. No, sir.
Q. Have you seen him?
A. No, sir.
Q. Do you remember the last visit of Don Pedro A. Roxas at the Hacienda of Nasugbu?
A. Yes, sir.
Q. When, or on what date, approximately?
A. According to my calculation, in April.
Q. Of what year?
A. Of this year.
Q. Did you see Don Pedro Roxas during that visit?
6 A. Yes, sir.
Q. When and where?
A. In the ranch house upon his last arrival.
Q. During this visit did you or did you not go to some part of the Hacienda in company with Don Pedro Roxas or Don Florencio Oliva?
A. Yes, sir.
Q. Where did you go and who accompanied you?
A. Don Pedro, Don Florencio, Modesto Villadolid; we went to visit the place called Maugat.
Q. In what barrio is Maugat?
A. It is next to Prensa.
Q. After arriving at Prensa where did you go to?
A. We visited the engine of Captain Marcelo.
Q. In what place or site?
A. In the same place,—Maugat.
Q. What kind of engine do you refer to?
A. It is a broken steam engine, made to grind sugar cane.
Q. Who accompanied you and Don Pedro Roxas on that visit to Prensa?
A. There were four of us.
Q. State the names to the Court if you know them?
A. Pedro Salenguit, Catalino Villadolid, Mariano Barcelon and I, Felix Barcelon.
Q. After the visit to Prensa and the engine where did you go?
A. We passed by the places called Quinamaalat and in Dayap the new Prensa.
Q. After visiting the new Prensa where did you go?
A. We visited those who were digging in the ground to make a ditch.
Q. And afterwards, where did you go?
A. We returned to town.
7 Q. Do you know the former barrio of Bunducan?
A. Yes, sir.

Q. Are the places mentioned by you, or any of them, in the former barrio of Bunducan or not?
A. We did not go through that barrio.
Q. Do you know the place called Alas-as?
A. Yes, sir.
Q. Where is that place?
A. It is next to Barac.
Q. On that day did you visit the place called Alas-as?
A. No, sir.

Cross-examination by Attorney FISHER:

Q. Where do you come from now?
A. From upstairs.
Q. Where is this place you call upstairs?
A. In the upper story of this courtroom.
Q. When did you come to the town of Batangas?
A. I went on a steamer and we came here. I do not know if it was Friday or some other day.
Q. Where have you been since then?
A. In the barracks at Lipa.
Q. Have you been at liberty or a prisoner?
A. A prisoner, sir.
Q. How long have you been a prisoner?
A. Since they arrested us in Nasugbu.
Q. Who detained you in Nasugbu?
A. I was taken up by a person called Lieutenant Juan, who is my nephew.
Q. After being taken on board the steamer by Lieutenant Juan did you again go ashore in Nasugbu?
A. No, sir.
—. Were you questioned on board the steamer concerning this Julian Ramos?
8 A. Yes, sir.
Q. Is it not true that this examination to which you were subjected was had down in the hold close to the coal bunkers of the steamer?
A. Yes, sir.
Q. Is it likewise true that no American was then present, but that those who conducted the examination there in the hold of the ship were all Filipinos?
A. There was no American there.
Q. State how this examination was carried on; in what manner; how was it done?

Mr. HARVEY: I object to the continuation of the cross-examination because the questions are improper and are not true cross-examination and because it is not the time to make a cross-examination of this kind.

JUDGE: In view of the objection of the Government and the Court understanding that the present hearing or preliminary investigation is under Section 13 of G. O. 58, the defense is not authorized to cross-examine the witnesses presented by the Government as an abso-

lute right—therefore the objection is sustained—the parties are notified that the Court is desirous of ascertaining as far as may be possible the character of every witness who is presented to the Court and can within certain limits permit the defense to cross-examine the witnesses.

Attorney COHN: We offer to prove by means of the cross-examination of this witness that he has not seen nor has he spoken upon the subject matter of this case with either the accused or any one of the attorneys for the defense, nor Don Florencio Oliva; that the witness has been brought to this preliminary investigation because of certain statements of his made against the accused Pedro A. Roxas
9 which were obtained by force of personal violence and maltreatment inflicted upon the person of the witness aboard the Steamer "Mindanao" in the vicinity of the town of Nasugbu; that those statements were completely false and were made in order to escape from said maltreatment. The offer is made at this time in order to avoid every possiblity of rejecting the statement of the witness to this effect on the ground that the same had been procured by the intervention of the accused or of other persons at the latter's instance.

JUDGE: In view of the offer made by the defense the Court is desirous that the cross-examination continue in conformity with the said offer. Nevertheless, the defense is notified that a preliminary investigation is being held and we are not taking proofs upon a full trial. Proceed, Mr. Fisher. Let the witness answer the question objected to. Read the question. State how this examination was carried on, in what form, how was it done?

A. I told the truth to Lieut. Ramos and he did not wish to listen to me and he asked me if it was true that Don Pedro Roxas gave me twenty pesos which he delivered me and I answered that it was not true. My God! Holy Virgin! How they beat me! And he said to me, "Do not deny it because there is a person who says so" and then they brought Pedro Cañete into my presence and I asked him what for and he answered me that I should tell the truth, and then they made him go up above, and——

Prosecutor HARVEY: I object to the cross-examination because it is all hearsay and does not relate to acts committed by the accused and is completely foreign to the matter in hand.

JUDGE: The objection is overruled. Let the witness proceed with his narration.

WITNESS: And I answered that I had not given anything,—that I was not there—and then he said to me "Agree, now" and I agreed and gave this statement which is in the possession of the
10 Judge, on account of fear, although nothing has been done to me. They asked me if they had not maltreated me or given me water and I answered that they had not and then I stated what Pedro Cañete stated concerning what Don Pedro Roxas gave me and I agreed because I was then bruised and I decided to tell all here before the Judge.

Q. To what Judge do you say that you delivered or made a statement?

A. To this gentleman, there in Lipa. (Indicating with his hand Mr. Harvey and Mr. Blanchard.)

Redirect examination by Prosecuting Attorney HARVEY:

Q. After your arrival in Lipa did you make a statement before this gentleman, Mr. Blanchard, and before me, Mr. Harvey, and others?

A. Only before this gentleman, (indicating Mr. Blanchard) and before Lieut. Ramos, and other persons whom I do not know.

Q. Was I not present at the taking of your statement and is it not true that I myself put the questions to you?

A. Yes, sir; you were present.

Q. And after your statement the same was read in your presence?

A. Yes, sir.

Q. Do you know this signature here set forth? (Indicating to him the document Letter A.)

A. Yes, sir; that is my signature.

Prosecuting Attorney HARVEY: I offer as evidence in this investigation the document identified by the witness marked with the letter A.

JUDGE: Let it be admitted if there is no objection.

ATTORNEY FOR [illegible]VENDANT: We object to the admission of this document because by it the prosecution seeks to impeach its own witness.

Prosecuting Attorney HARVEY: During the cross-examina-
11 tion by the defense, during this morning session, the prosecution objected to the cross-examination on the ground that it was not proper cross-examination; that the cross-questions of the defense dealt with another matter distinct from that which is the object of the investigation and also that the statements of the witness in answer to the questions of the defense were hearsay and completely foreign to the matter under investigation before the Court. As the Court has permitted the defense to cross-question upon these points against the objection of the prosecution the latter now asks permission to question the witness upon the same points.

Attorney FISHER: I withdraw the objection.

JUDGE: Let the said document be admitted and filed. (To the witness:) You, Felix Barcelon: Let us see. The present statement which you made in open court this morning and which is in the following terms,—is it true or not?

Clerk's note.—Thereupon by order of the Court there was read to the witness his entire statement appearing at pages 2 to 6.

JUDGE: Pay strict attention in order that you may ratify said statement or have the errors corrected, if there are such.

WITNESS: After having been taken on board the steamer I went ashore in Nasugbu to get some clothes and in this respect I correct what I said in my statement to the effect that I did not go ashore and in all else I ratify it.

JUDGE: Then it is true or is not true that you have seen Julian Ramos, the so-called leader of brigands?

A. No, sir.

JUDGE: What do you mean to say, is it true or is it not true?

A. I have not seen him.

JUDGE: And concerning this sum of twenty pesos, Conant, did Don Pedro Roxas give the same to you or not?

12 A. Nothing, sir.

Prosecuting Attorney HARVEY: When you were aboard the steamer were you awaiting the oppurtunity to state the truth before Mr. Blanchard and before me, as you have stated this mo*n*ring?

DEFENSE: We object upon the ground that the witness has not made such a statement.

Mr. HARVEY: I withdraw the question.

This declaration having been read to the witness was found by him to be correct and was signed by him and by his Honor the Judge to which I certify.

(S'g'd) FELIX BARCELON.

13 UNITED STATES OF AMERICA.

The Supreme Court of the Philippine Islands.

Extract from the Minutes of the Session of Aug. 2, 1905.

"Having considered the writing filed by Messrs. Fred C. Fisher and Charles C. Cohn, praying for the issuance of a writ of *habeas corpus* in favor of Felix Barcelon, who, as is alleged, is unlawfully detained and deprived of his liberty in the town of Batangas, Province of Batangas, Philippine Islands, by a Captain of the Insular Police, in obedience to the instructions of David J. Baker, Jr., Colonel of said Corps, in order that said Felix Barcelon may be brought before this Court and, after a full hearing in the matter, that he be placed immediately at liberty and that the said Captain of the Constabulary, as well as the aforesaid Colonel Baker, be prohibited from interfering in any manner with the liberty of the said Felix Barcelon, and that they be condemned to pay the costs, the Court, duly informed, decreed that it be ordered, and it hereby is ordered, of the said Captain of the Insular Police and of David J. Baker, Jr., Colonel of said Corps, that they appear in person, or by representatives, before this Court on Friday, the 4th day of the present month, at the hour of 9.00 o'clock, a. m. of said date, to show cause why the writ of *habeas corpus* should not be issued."

J. E. BLANCO,
Clerk of the Supreme Court, P. I.,
By H. D. McGEORGE, *Deputy.*

14 THE UNITED STATES OF AMERICA.

In the Supreme Court of the Philippine Islands.

In the Matter of the Application by FRED C. FISHER and CHARLES C. COHN for a Writ of *Habeas Corpus* in Behalf of Felix Barcelon.

Answer of Respondents.

The undersigned, in representation of Colonel David J. Baker, Jr., and Captain W. E. Thompson, respondents, in answer to the order of this Honorable Court to appear and show cause why the writ of *habeas corpus* should not issue as requested, respectfully states to the Court as follows:

I. That the writ of *habeas corpus* should not issue upon the application filed herein, because the Court is without jurisdiction or authority to grant the privilege of the writ of *habeas corpus* in the Province of Batangas, for the reason that on January 31, 1905, the Governor General, pursuant to the resolutions and request of the Philippine Commission, suspended such writ in the provinces of Cavite and Batangas, in accordance with the provisions of section five of the Act of Congress known as the "Philippine Bill," the Philippine Commission and the Governor General basing such suspension upon the fact that certain organized bands of ladrones in said provinces are in open insurrection against the constituted authorities; and the said bands, or parts of them and some of their
15 leaders are still in open resistance to the constituted authorities. A copy of said resolutions is hereto attached, ma ed "A," and a copy of the order of the Governor General, issued pursuant to said resolutions, suspending such writ in said two provinces, and setting forth the grounds for such suspension, is also attached, marked "B," and said exhibits are made a part of this answer.

II. Not waiving the question of jurisdiction, the respondents state that it is true that Felix Barcelon was detained in the month of April, 1905, by order of Colonel David J. Baker, Jr., Assistant Chief of the Philippines Constabulary, and that said Barcelon is now detained under the surveillance of Captain W. E. Thompson, Senior Inspector of Constabulary in the Province of Batangas; but that the writ of *habeas corpus* in behalf of said Barcelon should not issue upon the application of Fred C. Fisher and Charles C. Cohn, because the said Barcelon states that such surveillance is with his consent and that he is satisfied to remain with Captain Thompson, and that he has never authorized or requested any lawyer to represent him in the Supreme Court or before any other tribunal in *habeas corpus* proceedings, and that if same is being done, it is without his consent and against his wishes, as will more clearly appear from the telegrams attached hereto, marked "C," "CA" and "CB," respectively, and made a part of this answer.

III. Not waiving the questions of jurisdiction and the authority of Messrs. Fred C. Fisher and Charles C. Cohn to make the appli-

cation herein without the knowledge, consent or approval of said Felix Barcelon, and against his wishes, the respondents respectfully submit the following statement of facts:

That Felix Barcelon is a witness for the prosecution in
16 the case of the United States against Pedro A. Roxas, pending in the Court of First Instance of Batangas Province, in which cause the applicants Fred. C. Fisher and Charles C. Cohn are attorneys for the defense.

That in the early part of April, 1905, said Filix Barcelon and others made declarations that said Roxas had sent sums of money to a band of ladrones operating within the Roxas Hacienda in the Municipality of Nasugbu, Province of Batangas.

That thereafter, on or about the 15th day of April, 1905 in the town of Lipa, Province of Batangas, the said Felix Barcelon made a declaration in writing in the Tagalog language, which is attached to the record in the Court of First Instance, but a substantially correct translation thereof is attached hereto, marked "D," and made a part of this answer.

That thereafter, on Monday, April 17, 1905, the said Felix Barcelon was called as a witness for the prosecution in the preliminary examination of the cause against Pedro A. Roxas, and thereupon testified as set forth in the application herein.

That thereafter, on or about May 8, 1905, said Felix Barcelon made a declaration in writing in the Tagalog language which is hereto attached, marked "E," together with the tra-slation of same, marked "F," and which are made a part of this answer.

That the said Felix Barcelon was a tenant upon the Roxas Hacienda in the Municipality of Nasugbu, and because of intimidations and threats to kill the said Barcelon if he did not deny his declarations made to the authorities at Nasugbu and testify before the Court that he had been maltreated and compelled to make such declarations, it was then and is now deemed necessary, in order to
17 protect the said Barcelon from such threats, intimidations, and possible assassination, that the said Barcelon be kept under the care and surveillance of some authority capable of giving him protection, and he is now under the care and protection of Captain W. E. Thomson, is living in the house of Captain Thomson, and says that he is satisfied to remain there.

Respectfully submitted,

(S'g'd) GEO. R. HARVEY,
Assistant Attorney General,
In Representation of the Respondents.

18 "A."

Excerpt from the Minutes of the Philippine Commission of January 31st, 1905.

Whereas, certain organized bands of ladrones exist in the Provinces of Cavite and Batangas who are levying forced contributions upon the people, who frequently require them, under compulsion,

to join their band, and who kill or maim in the most barbarous manner those who fail to respond to their unlawful demands and are therefore terrifying the lawabiding and inoffensive people of those provinces; and

Whereas, these bands have in several instances attacked police and Constabulary detachments and are in open insurrection against the constituted authorities; and

Whereas, it is believed that these bands have numerous agents and confederates living within the municipalities of the said provinces; and

Whereas, because of the foregoing conditions there exists a state of insecurity and terrorism among the people which makes it impossible in the ordinary way to conduct preliminary investigations before justices of the peace and other judicial officers:

Now, therefore be it resolved, That, the public safety requiring it, the Civil Governor is hereby authorized and requested to suspend the writ of *habeas corpus* in the provinces of Cavite and Batangas.

[Seal, Philippine Commission.]

Certified,
(S'g'd) C. W. CALVIN,
Recorder, Philippine Commission.

19 "B."

Office of the Civil Governor of the Philippine Islands.

Executive Order No. 6.

MANILA, *January* 31, 1905.

Whereas certain organized bands of ladrones exist in the provinces of Cavite and Batangas who are levying forced contributions upon the people, who frequently require them under compulsion to join their bands, and who kill or maim in the most barbarious manner those who fail to respond to their unlawful demands and are therefore terrorizing the lawabiding and inoffensive people of those provinces; and

Whereas these bands have in several instances attacked police and Constabulary detachments, and are in open insurrection against the constituted authorities, and it is believed that the said bands have numerous agents and confederates living within the municipalities of the said provinces; and

Whereas, because of the foregoing conditions, there exists a state of insecurity and terrorism among the people which makes it impossible in the ordinary way to conduct preliminary investigations before justices of the peace and other judicial officers:

In the interest of the public safety, it is hereby ordered that the writ of *habeas corpus* is from this date suspended in the Provinces of Cavite and Batangas.

LUKE E. WRIGHT,
Civil Governor.

20 "C."

(Translation.)

BATANGAS, *Aug.* 4, 1905.

Asst. Atty. Gen. Harvey, Manila.

Referring to your telegram to Senior Inspector Thompson, this gentleman has brought before me Felix Barcelon who told me that he was not with Captain Thompson as a prisoner, since he was permitted to go about freely wherever he liked, that he had never asked or authorized any lawyer to represent him before the Supreme Court or any other court, and that he now lives in the house of said Captain Thompson, where he is satisfied to remain. I advise you of this at the request of Senior Inspector Thompson.

AGUILERA, *Governor.*

21 United States Signal Corps.

Telegram received at:— "CA."

"4 Bu S N 133 OB 8 AM

BATANGAS, *August* 7, 1905.

Harvey, Attorney General, Manila.

Retel this date, following would be true and correct allegation: That while it is true that Felix Barcelon was detained in April, 1905, by order Col. Baker, and is now under surveillance of Capt. Thompson, writ of *habeas corpus* in his behalf should not issue upon application of Fisher and Chon, because said Barcelon states that he does not consider himself in detention and that he is satisfied to remain in Capt. Thompson's house, that he never has authorized or requested any lawyer to represent him before supreme court or other tribunal in *habeas corpus* proceeding, and that if Cohn and Fisher or anyone else are representing themselves as his attorney, they are doing it without his knowledge or consent, and contrary to his wishes.

THOMPSON."

22 "CB."

United States Signal Corps.

Telegram received at:—

"5 Bu S S 110 OB 1019 AM Rush Rush

BATANGAS, *Aug.* 7, 1905.

Harvey, Fiscal General, Auxiliar, Manila.

Felix Barcelon made affidavit before me this morning which I mailed. Deponent requested Captain Thompson to permit him to remain in Thompson's house until after he could testify in Roxas case. Thompson granted this permission and from June 3 to date Barcelon has lived in Thompson's house not as a prisoner but as a

gratuitous lodger. Deponent does not request nor authorize, nor does he desire legal representation before any tribunal as he has no complaint to make. If Fisher and Cohn or any other lawyer or individual are before the Supreme Court in deponent's behalf it is without his knowledge or consent.

PASTOR, *Escribano.*"

23 "D."

LIPA, BATANGAS, *April* 15, 1905.

Declaration of Felix Barcelon.

I, Felix Barcelon, sixty-seven years of age, a native of the town of Nasugbu, Province of Batangas, Philippine Islands, do hereby freely, voluntarily, and truthfully declare as follows:

I have lived in Nasugbu continuously since my birth. I am a farmer on the hacienda of Don Pedro Roxas. I know Don Pedro Roxas, Sr., and Don Pedro Roxas, Jr., and also know Don Florencio Oliva. I have known Don Pedro Roxas, Sr. since my childhood, and have known his son, Don Pedro Roxas, Jr., since before the insurrection, when he was a boy. I have known Don Florencio Oliva since he came to Nasugbu. I don't know how many years Don Florencio Oliva has been in Nasugbu, but when he came there he was a young man and unmarried. I have never had any difficulties or troubles with Don Pedro Roxas or with Don Florencio Oliva, and I am friendly toward both of them. I have seen Julian Ramos, who I understand is the chief of a band of ladrones, and think I would know him if I should see him again. In one of the days of this month of April, 1905,—the date I do not remember—I went with Don Pedro Roxas, Jr., Don Florencio Oliva, Pedro Cañete, Pedro Salanguit, and Mariano Barcelon, for the purpose of inspecting the land in the hacienda at Prensa; Prensa is the place where there is a dam for storing water for irrigation. Then we went up to Bunducan, near the mountains, and on arrival there, Don Pedro Roxas, Jr. gave me P20.00, Conant, and told me to take it and give it to Julian Ramos. I asked where Julian Ramos
24 was, and Don Florencio Oliva then told me that he was in the sitio of Alas-as. Then I went to the sitio of Alas-as, accompanied by Pedro Cañete, Pedro Salanguit, and Mariano Barcelon, and we found Julian Ramos and I delivered to him the money sent by Don Pedro Roxas, and told Julian Ramos that Don Pedro Roxas had sent him the money, and Julian Ramos told me to give his thanks to Don Pedro Roxas. My three companions accompanied me because Don Florencio Oliva told them to do so. Don Florencio told me to accompany him and Don Pedro from the poblacion to the "prensa." I am a tenant of the hacienda and get water from the irrigation ditch for the purpose of irrigating my land; Pedro Cañete, Pedro Salanguit, and Mariano Barcelon are not tenants of the hacienda, but are employees on the hacienda, who are employed as inspectors and guards, and as messengers. That day we left Nasugbu very early in the morning and went to the "prensa;" then

we went to Bunducan. The sitio of Alas-as is very near to Bunducan; after I delivered the money to Julian Ramos we returned to Bunducan, where Don Pedro Roxas and Don Florencio Oliva were waiting, and then we returned to Nasugbu that same morning in time for breakfast. We all went on horseback to Prensa and Bunducan, and my three companions and I also went on horseback from Bunducan to the place where we found Julian Ramos. Don Florencio Oliva was riding a dark mare—an American mare; the rest of us rode on Filipino horses. The horse ridden by Don Pedro Roxas was an iron grey Filipino horse. When we arrived at the place where we found Julian Ramos, all four of us dismounted and Mariano Barcelon held the bridle of my horse and the others were tied and Pedro Cañete and Pedro Salanguit and I went to Julian Ramos and I delivered the money to Ramos and the two Pedros saw me deliver it.

The foregoing declaration is the truth, the whole truth,
25 and nothing but the truth, and I have not been maltreated, coerced, or abused in any manner by any body in order to compel me to make this declaration.

——.

Witnesses:

——.

——.

"F."

26 *Investigation of Witnesses in the Roxas Case.*

LIPA, BATANGAS, *May* 8, 1905.

Declaration of Felix Barcelon.

Investigation by Mr. HARVEY:

Q. Your name is Felix Barcelon?
A. Yes, sir.
Q. How old are you?
A. Sixty-seven.
Q. Where were you born?
A. In Nasugbu.
Q. Have you lived there all your life?
A. Yes, sir.
Q. Are you a tenant on the Roxas hacienda in Nasugbu?
A. Yes, sir.
Q. Who is the manager or encargado of the Roxas Hacienda in Nasugbu?
A. Florencio Oliva.
Q. Do you know Don Pedro A. Roxas?
A. Yes, sir; I knew the father and the son.
Q. Do you remember having made a declaration here in Lipa some three or four weeks ago?
A. Yes, sir.

Q. Then afterwards you testified in the Court at Batangas, did you not?

A. Yes, sir; after I had left here.

Q. In the declaration that you made before the Court, you stated that the declaration you had made a few days before that in Lipa was not true. Please state whether you feel at liberty and perfectly free at the present time to tell the truth, the whole truth, and nothing but the truth, about the matter mentioned in your declaration.

27 A. Yes, sir; the reason why I told the story in the Court in Batangas is that there was some person who came to me while I was in the cuartel at Batangas and told me to tell the Court that the statement that I had made in Lipa was false. I do not know who the person was, as it was at night.

Q. What did that person say to you in the cuartel in Batangas?

A. He told me to tell the court that that statement that I made in Lipa was a lie and to tell them that I had been beaten by Lieut. Ramos in order to make me make that statement.

Q. Did that person say anything about what would happen if you did not deny that statement before the Court?

A. No, sir; he just told me to deny that statement.

Q. Do you know about what time of the night it was that this person came and said that to you?

A. It was after eight o'clock the night before I made my declaration in the Court at Batangas.

Q. Had you already gone to sleep before this man came and told you that?

A. I had gone upstairs to go to sleep but had not yet gone to sleep.

Q. Pedro Ruffy went to Batangas with you and staid with you until the time you testified before the Court, did he not?

A. Yes, sir.

Q. Where was Pedro Ruffy when this man came to you and told you that?

A. He was upstairs.

Q. Had he gone to bed?

A. Yes, sir.

Q. Do you know whether he was asleep of not?

A. When I went back upstairs he was awake.

28 Q. Do you mean when you went upstairs to go to sleep?

A. Yes, sir.

Q. Did you go upstairs to go to sleep before the man came and told you what you have said?

A. Yes, sir, and when I went to the rear to make water was when I saw the man who told me to deny the statement that I had made in Lipa.

Q. Were you at the rear when the man told you to deny your statement?

A. I was coming from the rear.

Q. Did you go to the rear upstairs or downstairs?

A. Downstairs, alongside the wall outside the house.

Q. Back of the house?
A. Yes, sir.
Q. Did you go upstairs to go to bed and then afterwards go down stairs to go to the rear?
A. Yes, sir; I went upstairs, then I came down stairs, went to the rear and went back upstairs again.
Q. Did anybody accompany you when you went down stairs to go to the rear?
A. No, sir.
Q. And you say it was when you were returning from the rear that you met the person who told you to deny your statement when you went before the Court? Is that the way it was?
A. Yes, sir.
Q. Then there was nobody with you when this person approached you?
A. No, sir.
Q. Pedro Ruffy was upstairs and had already gone to bed?
A. Yes, sir.
Q. And you say that when you got back upstairs after
29 going to the rear you think that Pedro Ruffy was asleep?
A. Yes, sir; and I also lay down.
Q. Who accompanied you and Pedro Ruffy to Batangas and who stayed with you at the cuartel or Constabulary headquarters?
A. Arciga.
Q. Where was Arciga when you went down stairs to the rear that night?
A. He and Captain Pedro were upstairs lying down.
Q. Why did you go before the Court next day and tell the Court that Lieut. Ramos had beaten you and compelled you to conform to a statement that had been made by somebody else?
A. That night when that man came to me he told me that when I went before the Court to say that Lieut. Ramos had beaten me and compelled me to conform to the statements that were made by the other witnesses, and that I should deny the statement that I had made in Lipa.
Q. Why did you do what that man told you to do,—that is,—why did you tell the Court that Lieut. Ramos had beaten you and that what you had stated in your declaration was not true?
A. Because that man told me to deny everything and to tell the Court that Lieut. Ramos had beaten me.
Q. Were you afraid for any reason not to do what that man told you to do?
A. Yes, sir; I was afraid of him, because he told me he would kill me if I did not tell the Judge what he said.
Q. The day before you began this declaration you talked with Mr. Nelson, my interpreter, did you not?
A. Yes, sir.
Q. Has Mr. Nelson threatened you or abused you in any way while he was talking to you?
A. Ever since I left Lemery (Taal) I have not been treated
30 badly at all, except that I have been kept incomunicado.

Q. Has Mr. Nelson treated you kindly or unkindly during the time that he was talking with you after you came to Lemery?

A. He has always treated me kindly and has never threatened me. He told me to tell the whole truth here; that is the only thing.

Q. Do you feel perfectly willing to tell the truth, the whole truth, and nothing but the truth now in answer to the questions that may be asked you?

A. Yes, sir.

Q. Do you remember the day of the week that you went on board the Coast Guard boat in Nasugbu?

A. I am not sure but I think it was Wednesday.

Q. Who asked you to go aboard the Cost Guard boat?

A. My nephew Juan Barcelon, lieutenant of police of Nasugbu.

Q. Who went with you on the banca when you went out to go on board the Coast Guard boat?

A. Teniente Juan and Mariano Barcelon and the oarsmen.

Q. When you arrived on board the Coast Guard boat what was done with you or what did you do?

A. They took a statement from me.

Q. Who took that statement?

A. Lieutenant Ramos.

Q. When you first went on board the boat did Lieutenant Ramos talk with you and Mariano Barcelon?

A. Yes, sir.

Q. Who else was present?

A. Mariano Barcelon, Lieutenant Ramos and myself.

Q. What did Lieutenant Ramos say to you?

31 A. He asked me if it was true that I had taken twenty pesos to Julian Ramos which was given to me by Don Pedro Roxas, and I told him "Yes" and I told him that Captain Florencio had told me to take the money to Alas-as and that the four of us started to the place called Alas-as. When we arrived there we met some men and we tied our horses and I asked for Julian Ramos. The men showed me a man who wore a cap and I walked up to him, gave him the money, told him who had sent it and what I was told to tell him. He told me to thank Don Pedro and Don Florencio very much and I bade him good-by and returned and met Don Pedro and Don Florencio at Bunducan.

Q. When Lieutenant Ramos asked you about that matter did you tell him what you have stated in this declaration?

A. Yes, sir.

Q. Who was present when you told him those things?

A. Myself and Lieutenant Ramos were in the room and Mariano Barcelon was right outside the door.

Q. How did Lieutenant Ramos treat you while he was talking with you and taking your declaration?

A. Very well.

Q. Did Lieutenant Ramos abuse you in any way in order to compel you to tell him what you knew about that matter?

A. No, sir.

Q. Did anybody on board the boat mistreat you in any way in order to get you to make that declaration?

A. No, sir.

Q. Do you feel willing this morning to state the truth, the whole truth and nothing but the truth about that trip when Don Pedro gave you twenty pesos to take to Julian Ramos?

A. Yes, sir.

Q. How many times, if you remember, has Don Pedro A.
32 Roxas been to the Nasugbu Hacienda since last November?

A. Three times.

Q. Do you know what Don Pedro did in Nasugbu the different times that he came there?

A. The first time he came he came from Manila and the boat stopped in Nasugbu and Don Pedro came and got me and took me with him to Burias. When we returned to Nasugbu we unloaded the carabaos and Don Pedro came ashore to see that the carabaos were put ashore safely and then he returned to Manila. The third time he came to Nasugbu to give the carabaos to the tenants and this was the fourth time he came, when he was arrested.

Q. Who asked you to go out with Don Pedro Roxas and Don Florencio Oliva when they went to visit the Prensa this last time that Don Pedro was in Nasugbu?

A. Nobody asked me, but when I heard that Don Pedro was at the Hacienda I voluntarily went there to see him.

Q. Did you go up to the hacienda to seen Don Pedro the day before you went with him out to the prensa?

A. Yes; the day that Don Pedro arrived at the hacienda, I think it was on a Friday, about noon time; I went to see him and he told me to come back about three o'clock in the afternoon, that he wanted to see the tubigan, and after he had visited the tubigan, he told me to come back the next day, that he wanted to visit the prensa.

Q. Did you visit the prensa?

A. Yes, sir.

Q. Who went to the prensa?

A. Captain Florencio Oliva, Don Pedro Roxas, myself, Pedro Cañete, Mariano Barcelon and Pedro Salanguit.

Q. Did you go on foot or horseback, or how did you go?

A. On horseback.

33 Q. Can you describe the horses ridden by the different men mentioned?

A. Yes, sir.

Q. Please describe them?

A. Captain Florencio rode a black American mare; Don Pedro rode a gray native mare; the horse I rode was a gray Filipino mare and the horses that the other three men rode were bays.

Q. Do you know whether they were mares or stallions?

A. I do not know whether they were all mares or mares and stallions.

Q. Do you know whether the animal ridden by Mariano Barcelon was a horse or a mare?

A. I think it was a mare.

Q. About what time did you and the others leave the "casa hacienda" to go out to visit the prensa?
A. It was daylight but the sun had not come up.
Q. Where did this party go first after leaving the casa hacienda?
A. To the prensa.
Q. What was done at the prensa?
A. They inspected it.
Q. When they finished inspecting the prensa where did the party go?
A. We went to Bunducan.
Q. What did you do at Bunducan?
A. We did not do much of anything with the exception of giving me the money.
Q. Who gave you the money?
A. Don Pedro Roxas.
Q. Did he tell you what to do with it?
A. Captain Florencio told me to take the money to Alas-as and give it to Ramos.
34 Q. What Ramos?
A. I asked him what Ramos and he said "Ramos the insurrecto."
Q. What is this place called Alas-as; describe it?
A. It is a level piece of land up in the mountains and on one side there is a ridge of hills and on the other side there is also a ridge of hills and there is a gulch leading around between the two ridges of hills into the place called Alas-as, which is the level piece of land in the mountains.
Q. After Don Pedro Roxas gave you the twenty pesos did you go to Alas-as as directed by Don Florencio?
A. Yes, sir; we went there and took the money.
Q. Who was with you?
A. Pedro Cañete, Pedro Salanguit, Mariano Barcelon.
Q. Do you know why Pedro Cañete, Pedro Salanguit and Mariano Barcelon went with you?
A. Yes, sir; Captain Florencio told them to go.
Q. Did you find any people up in the mountain when you went to Alas-as?
A. Yes, sir; we found some people at Alas-as?
Q. How did you first know that you had found these people?
A. We met a man who asked who we were and where we were going; I told him who we were and told him we had brought money from Don Pedro and Captain Florencio and I asked him for Ramos.
Q. Was the man that you met armed or not?
A. Yes, sir.
Q. What kind of arms did he have?
A. I think it was a Remington gun.
Q. After you told him who you were and what you wanted what did he say and do?
A. I asked him where Julian Ramos was and he showed me a man with a cap and told me that was Julian Ramos and I went to him and gave him the money.
35 Q. What did you say to Julian Ramos when you gave him the money?

A. I told him that they had sent the money and he asked me who had sent the money. I told him Don Pedro and Captain Florencio. He told me to thank them very much and I bade him good-by and we returned to Bunducan where we met Captain Florencio and Don Pedro.

Q. Did it take you a very long time to go from Bunducan up to Alas-as and back to Bunducan?

A. It did not take us very long because Alas-as is very close to Bunducan and as we were on horseback we went very quickly.

Q. When did you return to the "casa hacienda?"

A. That same morning.

Q. Do you remember what day of the week it was that you went out to Alas-as?

A. Saturday morning; it was the second day Don Pedro was there.

Q. Do you know when Don Florencio Oliva was taken aboard the Coast Guard boat?

A. No, sir.

Q. After you left Nasugbu with your companions on the Coast Guard boat where did you go?

A. To Batangas; the boat stopped at Taal and then we went to Batangas.

Q. When you arrived in Batangas what did you do?

A. When we came ashore we went right on to Lipa.

Q. After you arrived in Lipa did you make a declaration?

A. Yes, sir.

Q. Do you recognize anyone here today who was present when you made that declaration?

A. Yes, sir. (Pointing to Mr. Blanchard, Mr. Harvey, Captain Baker, Mr. Poblete and Mr. Noon.) I do not remember their names and in fact I do not know them.

36 Q. In that declaration did you testify to the truth, the whole truth and nothing but the truth, or did you make a false declaration?

A. Everything that I said there was the truth, but that man came to me in Batangas and told me to tell that it was a lie.

Q. Are you willing to go before the Court and explain why you testified in Court at Batangas that you had been beaten by Lieutenant Ramos; and that your declaration made in Lipa was not the truth?

Q. Yes, sir.

Q. Do you know the name of the man who came to you at the cuartel at Batangas and threatened to kill you if you did not deny before the Court the declaration you had made against Don Pedro Roxas?

A. No, sir; I do not know his name.

Q. Did you know his voice, or could you tell whether he was a man from Nasugbu?

A. No, sir.

Q. Was he a Spaniard, a Filipino or an American?

A. He was a Filipino.

Q. Did he speak in Spanish or Tagalog?

A. In Tagalog.

Q. Was he a short man or a tall man?
A. A little shorter than I am.
Q. Was he a thin man or a fat man?
A. A fat man.
Q. Was he dressed in white or in dark clothing?
A. In white.
Q. Do you know whether he wore a dark belt around his waist or not?
37 A. I did not see.
Q. Are you willing to make oath to this declaration before the Assistant Attorney General as the truth, the whole truth and nothing but the truth, so help you God?
A. Yes, sir.
Q. Can you read and write in the Tagalog language?
A. I can read a little in the Tagalog language and I can sign my name; that is about all.
Q. Would you like to have your declaration read over to you by Mr. Poblete, in the presence of Mr. Nelson and others who understand Tagalog, before you sign it?
A. Yes, sir.
(Signed) FELIX BARCELON.

In the presence of:
JOHN NELSON.
GEORGE R. HARVEY.
R. D. BLANCHARD.
W. P. BAKER.
JOHN N. NOON.
JOSÉ POBLETE.

Subscribed and sworn to before me this 10th day of May, 1905.
(Signed) GEO. R. HARVEY,
Assistant Attorney General of the Philippine Islands.

Filed in the Clerk's Office of the Supreme Court of the Philippine Islands this 5th day of August, 1905.
(Stamp) J. E. BLANCO, *Clerk,*
(S'g'd) By H. D. McGEORGE, *Deputy.*

38 UNITED STATES OF AMERICA, *Philippine Islands.*

In the Supreme Court of the Philippine Islands.

In the Matter of the Petition for the Issuance of the Writ of *Habeas Corpus* in Favor of FELIX BARCELON.

Now come Fred C. Fisher and Charles C. Cohn, petitioners in the above entitled action, and respectfully state to the Honorable Supreme Court:
That subsequent to the date of the filing of the return of the re-

spondents to the order of this Honorable Court wherein, it is alleged that the petitioners lack the capacity to represent the prisoner Felix Barcelon.

The said petitioners have received of said Barcelon an express authorization to represent him in this matter, which authorization is drawn in the following terms:—

"Batangas, P. I., 27 Agosto de 1905. Sa pamagitan nito'y aking pinatutuhanan na minamarapat ng calooban co ang boong pag u usig ng mga Abogados Senores Cohn at Fisher upang matamo ang tunay na libertad co dito sa aking pag ca bilango. (firmado) Felix Barcelon."

Whereof the translation to English is as follows:—

"Batangas, P. I., August 27, 1905. I hereby cause it to appear that I voluntarily approve all of the acts practiced by the attorneys Messrs. Cohn and Fisher to obtain my true liberty from this imprisonment in which I find myself. (Signed) Felix Barcelon."

That the original of said authorization the undersigned preserve in their own possession on account of its great importance and for fear that the same be lost, but the undersigned are prepared to produce the same to this Court if so required.

Manila, P. I., Sept. 1st, 1905.

(Sgd.) F. C. FISHER.

39 (Sgd.) CHARLES C. COHN.

Received a copy this 1st day of Sept., 1905.

(Sgd.) GEO. R. HARVEY,
Assistant Attorney General.

Filed in the Clerk's office of the Supreme Court of the Philippine Islands, this 1st day of September, 1905, 11.50 a. m.

J. E. BLANCO, *Clerk,*
By H. D. McGEORGE, *Deputy.*

40 UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

No. 2808.

FELIX BARCELON
vs.
DAVID J. BAKER, JR., Colonel of the Philippines Constabulary, and JOHN DOE THOMPSON, Captain of the Philippines Constabulary.

JOHNSON, *J.*

This was an application by Fred C. Fisher and Charles C. Cohn, attorneys-at-law, on behalf of the plaintiff, Felix Barcelon, for the writ of *habeas corpus*. The said application alleges, among other things, the following:—

1. That the said applicant is detained and restrained of his liberty at the town of Batangas, in the Province of Batangas, Philippine Islands;

2. That the person who detained and restrained the said applicant of his liberty is John Doe Thompson, Captain of the Philippines Constabulary, acting under and in pursuance of the orders of David J. Baker, Jr., Colonel of the Philippines Constabulary;

3. That the detention and restraint of the said applicant is wholly without legal authority therefor. (Here follows a statement of the alleged causes of arrest and detention of the said applicant by the said defendants);

4. That the detention and restraint of the said applicant is not under or by virtue of any process issued by any court or
41 magistrate, nor by virtue of any judgment or order of any court of record, nor of any court nor of any magistrate whatsoever.

5. That there has not existed during any of the times in this petition mentioned, and there does not now exist, in said Province of Batangas, Philippine Islands, nor in any part thereof, rebellion, insurrection or invasion, nor any of them, in any form or degree; and that all the courts of law, organized and provided by law for the Province of Batangas, have been at all of the times hereinbefore mentioned, in the full and complete exercise of their functions, without interruption of any nature or kind.

Wherefore your petitioners pray that a writ of *habeas corpus* be issued, requiring the said John Doe Thompson, Captain of the Philippines Constabulary, and David J. Baker, Jr., Colonel of the Philippines Constabulary, to bring before this Honorable court the person of the said Felix Barcelon, and that after a full hearing in accordance with law, the said Felix Barcelon be liberated and released from all restraint and detention, and that respondents be enjoined from any and all interference with the personal liberty of said Felix Barcelon.

(Signed) FRED. C. FISHER.
CHARLES C. COHN.

(The foregoing facts were duly sworn to by the said applicants.)

The court after considering the foregoing petition, made an order on the 3rd day of August, 1905, directing the said David J. Baker, Jr. and the said John Doe Thompson to appear before this court on the 4th day of August, 1905, at nine o'clock A. M., to show cause why the writ of *habeas corpus* should not be granted in accordance with the prayer of said petition.

42 At nine o'clock A. M. on the 4th day of August, the respondents, by the Attorney General of the Philippine Islands, through George R. Harvey, representing the latter, filed their answer to the foregoing petition. By the reason of the fact that the said answer failed to disclose whether or not the said Felix Barcelon was actually detained and deprived of his liberty by the said respondents, the court directed that said answer be amended, stating with-

out equivocation whether or not Felix Barcelon was actually detained by the said respondents, which amended answer, among other things, contained the following allegation:

First. That the writ of *habeas corpus* should not issue on the application filed herein, because the court is without jurisdiction or authority to grant the privileges of the writ of *habeas corpus* in the Province of Batangas, for the reason that on January 31st, 1905, the Governor General, pursuant to a resolution and request of the Philippine Commission, suspended said writ in the Provinces of Cavite and Batangas, in accordance with the provisions of section 5 of the Act of Congress known as "The Philippine Bill," the Philippine Commission and the Governor General basing such suspension upon the fact that certain organized bands of ladrones in said provinces were in open insurrection against the constituted authorities; and the said bands, or parts of them, and some of their leaders, were still in open resistance to the constituted authorities. The said resolution of the Commission and the said proclamation of the Governor General are in the words following:

(*Resolution of the Philippine Commission, dated January* 31*st,* 1905.)

"Whereas, certain organized bands of ladrones exist in the provinces of Cavite and Batangas, who are levying forced contributions upon the people, who frequently require them, under compulsion, to join their bands, and who kill or maim in the most barbarous
43 manner those who fail to respond to their unlawful demands, and are therefore terrifying the law-abiding and inoffensive people of those provinces; and

"Whereas, these bands have in several instances attacked police and constabulary detachments, and are in open insurrection against the constituted authorities; and

"Whereas, it is believed that these bands have numerous agents and confederates living within the municipalities of the said provinces; and

"Whereas, because of the foregoing conditions there exists a state of insecurity and terrorism among the people which makes it impossible in the ordinary way to conduct preliminary investigations before justices of the peace and other judicial officers;

"Now, therefore, be it resolved, That the public safety requiring it, the Governor General is hereby authorized and requested to suspend the writ of *habeas corpus* in the provinces of Cavite and Batangas."

(*Proclamation of the Governor General, Dated January* 31*st,* 1905.)

"Whereas, certain organized bands of ladrones exist in the provinces of Cavite and Batangas, who are levying forced contributions upon the people, who frequently require them, under compulsion, to join their bands, and who kill or maim in the most barbarous manner those who fail to respond to their unlawful demands, and are there-

fore terrifying the law-abiding and inoffensive people of those provinces; and

"Whereas, these bands have in several instances attacked police and constabulary detachments, and are in open insurrection against the constituted authorities, and it is believed that the said bands have numerous agents and confederates living within the municipalities of the said provinces; and

"Whereas, because of the foregoing conditions there exists a state of insecurity and terrorism among the people which makes it impossible in the ordinary way to conduct preliminary investigations before the justices of the peace and other judicial officers;

"In the interest of public safety, it is hereby ordered that the writ of *habeas corpus* is from this date suspended in the provinces of Cavite and Batangas."

(Signed) LUKE E. WRIGHT,
Governor General.

Second. Not waiving the question of jurisdiction, the respondents state that it is true that Felix Barcelon was detained in the month of April, 1905, by order of Colonel David J. Baker, Jr., Assistant Chief of the Philippine Constabulary, and that the said Barcelon is now detained under the surveillance of Captain W. E. Thompson, Senior Inspector of Constabulary, in the Provinces of Batangas.

44 By this answer, the respondents admit that they are detaining the body of the said Felix Barcelon, and deny the right of this court to inquire into the reasons therefor by virtue of the said resolution of the United States Philippine Commission and the proclamation of the Governor General, issued by authority of the same, suspending the privileges of the writ of *habeas corpus* in the said provinces of Cavite and Batangas.

Thus the question is squarely presented whether or not the judicial department of the Government may investigate the facts upon the legislative and executive branches of the Government acted in providing for the suspension and in actually suspending the privileges of the writ of *habeas corpus* in said provinces. Has the Governor General, with the consent of the Commission, the right to suspend the privileges of the writ of *habeas corpus?* If so, did the Governor General suspend the writ of *habeas corpus* in the provinces of Cavite and Batangas in accordance with such authority?

A paragraph of Section 5 of the Act of Congress of July 1st, 1902, provides:

"That the privileges of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion, insurrection or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the Governor General, with the approval of the Philippine Commission, whenever during such period the necessity for such suspension shall exist."

This provision of the Act of Congress is the only provision giving the Governor General and the Philippine Commission authority to suspend the privileges of the writ of *habeas corpus.* No question has been raised with reference to the authority of Congress to confer this

authority upon the President or the Governor General of these Islands, with the approval of the Philippine Commission.

This provision of the Act of Congress makes two conditions necessary in order that the President or the Governor General,
45 with the approval of the Philippine Commission, may suspend the privileges of the writ of *habeas corpus*. They are as follows:

First. When there exists rebellion, insurrection or invasion; and

Second. When public safety may require it.

In other words, in order that the privileges of the writ of *habeas corpus* may be suspended, there must exist rebellion, insurrection or invasion, and the public safety must require it. This fact is admitted, but the question is, who shall determine whether there exists a state of rebellion, insurrection or invasion, and that by reason thereof the public safety requires the suspension of the privilege of the writ of *habeas corpus*.

It has been argued and admitted that the Governor General, with the approval of the Philippine Commission, has a discretion, when insurrection, rebellion or invasion actually exist, to decide whether the public safety requires the suspension of the privileges of the writ of *habeas corpus;* but the fact whether insurection, rebellion or invasion does actually exist is an open question, which the judicial department of the Government may inquire into and that the conclusions of the legislative and executive departments (The Philippine Commission and the Governor General) of the Government are not conclusive upon that question.

In other words, it is contended that the judicial department of the Government may consider an application for the writ of *habeas corpus,* even though the privileges of the same have been suspended in the manner provided by law, for the purposes of taking proof upon the question whether there actually exists a state of insurrection, rebellion or invasion.

46 The applicants here admit that if a state or rebellion, insurrection or invasion, exists, and the public safety is in danger, then the President or Governor General, with the approval of the Philippine Commission, may suspend the privileges of the writ of *habeas corpus*.

Inasmuch as the President or Governor General, with the approval of the Philippine Commission, can suspend the privileges of the writ of *habeas corpus* only under the conditions mentioned in the said statute, it becomes their duty to make an investigation of the existing conditions in the archipelago, or any part thereof, to ascertain whether there actually exists a state of rebellion, insurrection or invasion, and that the public safety requires the suspension of the privileges of the writ of *habeas corpus*. When this investigation is concluded, the President or the Governor General, with the consent of the Philippine Commission, declares that there exists these conditions, and that the public safety requires the suspension of the privileges of the writ of *habeas corpus,* can the judicial department of the Government investigate the same facts and declare that no such conditions exist.

The Act of Congress above quoted, wisely provides for the investigation, by two departments of the Government, the legislative and executive, of the existing conditions, and joint action by the two before the privileges of the writ of *habeas corpus* can be suspended in these islands.

If the investigation and findings of the President, or the Governor General, with the Philippine Commission, is not conclusive and final, as against the judicial department of the Government, then every officer whose duty it is to maintain order and protect the lives and property of the people, may refuse to act, and apply to the judicial department of the Government for another investigation and
47 conclusion concerning the same conditions, to the end that they may be protected against civil actions, resulting from illegal acts.

Owing to conditions at times, a state of insurrection, rebellion or invasion may arise suddenly and may jeopardize the very existence of the state. Suppose, for example, that one of the thickly populated governments situated near this archipelago, anxious to extend its power and territory, should suddenly decide to invade these Islands, and should, without warning, appear in one of the remote harbors with a powerful fleet and at once begin to land troops. The Governor or Military Commander of the particular district or province notifies the Governor General by telegraph of this landing of troops and that the people of the district are in collusion with such invasion. Might not the Governor General and the Commission accept this telegram as sufficient evidence and proof of the facts communicated and at once take steps, even to the extent of suspending the privileges of the writ of *habeas corpus,* as might appear to them to be necessary to repel such invasion? It seems that all men interested in the maintenance and stability of the Government would answer this question in the affirmative.

But suppose some one, who has been arrested in the district upon the ground that his detention would assist in restoring order and in repelling the invasion, applies for the writ of *habeas corpus,* alleging that no invasion actually exists; may the judicial department of the Government call the officers actually engaged in the field before it and away from their posts of duty for the purpose of explaining and furnishing proof to it concerning the existence or non existence of the facts proclaimed to exist by the legislative and executive branches of the state? If so, then the courts may effectually tie the hands of the executive, whose special duty it is to enforce the laws and
48 maintain order, until the invaders have actually accomplished their purposes. The interpretation contended for here by the applicants, so pregnant with detrimental results could not have been intended by the Congress of the United States when it enacted the law.

It is the duty of the legislative branch of the government to make such laws and regulations as will effectually conserve peace and good order and protect the lives and property of the citizens of the state. It is the duty of the Governor to take such steps as he deemwise and necessary for the purpose of enforcing such laws. Every

delay and hindrance and obstacle which prevents a strict enforcement of laws under the conditions mentioned, necessarily tends to jeopardize public interests and the safety of the whole people. If the judicial department of the Government, or any officer in the government has a right to contest the orders of the President or of the Governor-General under the conditions above supposed, before complying with such orders, then the hands of the President or the Governor-General may be tied until the very object of the rebels or insurrectos or invaders has been accomplished. But it is urged that the President or the Governor-General, with the Philippine Commission, might be mistaken as to the actual conditions; that the legislative department, the Philippine Commission, might by resolution declare after investigation that a state of rebellion, insurrection or invasion exists, and that the public safety requires the suspension of the privileges of the writ of *habeas corpus,* when, as a matter of fact, no such conditions actually existed; that the President or the Governor-General, acting upon the authority of the Philippine Commission, might by proclamation suspend the privileges of the writ of *habeas corpus* without there actually existing the conditions mentioned in the Act of Congress. In other words, the applicants allege in their argument in support of their application for the writ of *habeas corpus,* that the legislative and executive branches of the government might reach a wrong conclusion
49 from their investigations of the actual conditions, or might, through a desire to oppress and harrass the people, declare that a state of rebellion, invasion or insurrection existed and that public safety required the suspension of the privileges of the writ of *habeas corpus,* when actually and in fact no such conditions did exist. We can not assume that the legislative and executive branches will act or take any action based upon such motives.

Moreover, it can not be assumed that the legislative and executive branches of the government, with all the machinery which those branches have at their command for examining into the conditions in any part of the archipelago, will fail to obtain all existing information concerning actual conditions. It is the duty of the executive branch of the Government to constantly inform the legislative branch of the Government of the condition of the Union as to the prevalence of peace or disorder. The executive branch of the Government, through its numerous branches of the Civil and military, ramifies every portion of the archipelago, and is enabled thereby to obtain information from every quarter and corner of the state. Can the judicial department of the Government, with its very limited machinery for the purpose of investigating general conditions, be any more sure of ascertaining the true conditions throughout the archipelago, or in any particular district, then the other branches of the Government? We think not.

We are of the opinion that the only question- which this department of the Government can go into with reference to the particular questions submitted here are as follows:

1. Admitting the fact that Congress had authority to confer upon the President or the Governor General and the Philippine Commis-

sion authority to suspend the privileges of the writ of *habeas corpus*, was such authority actually conferred? and

2. Did the Governor General and the Philippine Commission acting under such authority, act in conformance with such authority?

If we find that Congress did confer such authority and that the Governor General and the Philippine Commission acted in conformance with such authority, then this branch of the Government is excluded from an investigation of the facts upon which the Governor General and the Philippine Commission acted, and upon which they based the resolution of January 31st, 1905, and the proclamation of the Governor General of the same date. Under the form of Government established in the Philippine Islands, one department of the Government has no power or authority to inquire into the acts of another, which acts are performed within the discretion of the other department.

Upon and examination of the law we conclude:

First. That the paragraph of section 5 above quoted of the Act of Congress of July 1st, 1902, confers upon the Governor General and the Philippine Commission the right to suspend the privileges of the writ of *habeas corpus* under the conditions therein named.

Second. That the Philippine Commission, acting within the discretion which such Act of Congress confers upon them, did authorize the Governor General, by its resolution of January 31st, 1905, to suspend the privileges of the writ of *habeas corpus* in the manner and form indicated in the said proclamation of the Governor General of January 31st, 1905.

That said resolution of the Philippine Commission has the effect of law for the purposes for which it was enacted. The judicial department of the Government may examine every law enacted by the legislative branch of the Government for the purpose of ascertaining:

(*a.*) Whether or not such law came within the subject matter upon which the legislative branch of the Government might legislate; and

(*b.*) Whether the provisions of such law were in harmony with the authority given by the legislature.

If the judicial branch of the Government finds,

(*a.*) That the legislative branch of the Government had authority to legislate upon the particalar subject, and

(*b.*) That the particular law contained no provisions in excess of such department, then that investigation or that conclusion, conclusively terminates the investigation by this department of the Government.

We base our conclusions that this application should be dismissed upon the following facts:

First. Congress had authority to provide that the President or the Governor General, with the approval of the Philippine Commission, might suspend the privileges of the writ of *habeas corpus* in cases of rebellion, insurrection or invasion, when the public safety might require it.

Second. That the Philippine Commission, acting within this

power, had authority to pass the resolution above quoted, of January 31st, 1905, after an investigation of the condition.

Third. That by virtue of said Act of Congress, together with said resolution of the Philippine Commission, the Governor General had authority to issue the said proclamation of January 31st, 1905, suspending the privileges of the writ of *habeas corpus*.

Fourth. That the conclusion set forth in the said resolution and the said proclamation, as to the fact that there existed in the provinces of Cavite and Batangas open insurrection against the constituted authorities, was a conclusion entirely within the discretion
52 of the legislative and executive branches of the Government, after an investigation of the facts.

Fifth. That one branch of the United States Government in the Philippine Islands has no right to interfere or inquire into, for the purpose of nullifying the same, the discretionary acts of another independent department of the Government.

Sixth. Whenever a statute gives to a person or a department of the Government discretionary power, to be exercised by him or it, upon his or its opinion of certain facts, such statute constitutes him or it, the sole and exclusive judge of the existence of those facts.

Seventh. The Act of Congress gave to the President, or the Governor General, with the Approval of the Philippine Commission, the sole power to decide whether a state of rebellion, insurrection or invasion existed in the Philippine Archipelago, and whether or not the public safety required the suspension of the privileges of the writ of *habeas corpus*.

Eighth. This power having been given and exercised in the manner above indicated, we hold that such authority is exclusively vested in the legislative and executive branches of the Government and their decision is final and conclusive upon this department of the Government and upon all persons.

Happily we are not without high authority to support the foregoing conclusions. This is not the first time this same question has been presented in one form or another to the judicial department of the Government of the United States, as well as to the Government of the various States of the Union.

The same general question presented here was presented to the Supreme Court of the United States in the case of Martin *v.* Mott, in January, 1827. An Act of Congress of 1795 provided:

"That whenever the United States shall be invaded or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the state or states most con-
53 venient to the place of danger or scene of action, as he may judge necessary to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper."

In this case (Martin *v.* Mott) the question was presented to the court whether or not the President's action in calling out the militia was conclusive against the courts. The Supreme Court of the United States, in answering this question, said:

"The power thus confided by the Congress to the President is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without corresponding responsibility. It is, in its terms, a limited power, confined to *cases of actual invasion* or of *imminent danger of invasion*. If it be a limited power, the question arises, By whom is the exisency to be adjudged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militiaman who shall refuse to obey the orders of the President? *We are all of the opinion that the authority to decide whether the exigency has arisen belongs exclusively to the Persident and his decision is conclusive upon all other persons.* We think that this construction necessarily results from the nature of the power itself and from the manifest object contemplated by the Act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state and under circumstances which may be vital to the existence of the Union. * * * If a superior officer has a right to contest the orders of the President, upon his own doubts as to the exi-
54 gency having arisen, it must be equally the right of every inferior officer and soldier: * * * Such a course would be subversive of all discipline and exposed the best disposed officer to the chances of erroneous litigation. Besides, in many instances, the evidence upon which the President might decide that there is imminent danger of invasion might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interest and even safety might imperiously demand to be kept in concealment.

Whenever the statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. And in the present case we are all of opinion that such is the true construction of the Act of 1795. It is no answer that such power may be abused, for there is no power which is not susceptible of abuse."

Martin *v.* Mott (12 Wheat., 19), (25 U. S. Rep.).
Vanderheyden *v.* Young (11 Johns.) (N. Y. 150).

Justice Joseph Story, for many years a member of the Supreme Court of the United States, in discussing the question who may suspend the privileges of the writ of *habeas corpus,* under the Constitution of the United States, said:

"It would seem, as the power is given to Congress to suspend the writ of *habeas corpus* in cases of rebellion, insurrection or invasion, that the right to *judge* whether the exigency has arisen must conclusively belong to that body."

Story on the Constitution (5th ed. section 1342).

Justice James Kent, for many years a justice of the Supreme Court of the State of New York, in discussing the same question, cites the case of Martin *v.* Mott, and says:

55 "In that case it was decided and settled by the Supreme Court of the United States, that it belonged exclusively to the President to judge when the exigency arises, in which he had authority, under the Constitution, to call forth the militia, and that his decision was conclusive upon all other persons."

Kent's Commentaries (14th ed. Vol. 1 bottom page 323).

John Randolph Tucker, for many years a professor of constitutional and international law in Washington and Lee University, in discussing this question said:

"By an act passed in 1795, Congress gave to the President power to call out the militia for certain purposes, and by subsequent acts in 1807, power was given to him to be exercised whenever he should deem it necessary, for the purposes stated in the constitution; and the Supreme Court (U. S.) has decided that this executive discretion in making the call (for state militia) could not be judicially questioned."

Tucker on the Constitution.

John Norton Pomeroy, an eminent law writer upon constitutional questions, said:

"In Martin *v.* Mott it was decided that under the authority given to the President by the statute of 1795, calling forth the militia under certain circumstances, the power is exclusively vested in him to determine whether those circumstances exist; *and when he has determined by issuing his call, no court can question his decision.*"

Pomeroy's Constitutional Law, (Section 476).

Mr. Henry Campbell Black, a well-known writer on the Constitution, says:

"By an early Act of Congress it was provided that in case of an insurrection in any state against the Government thereof,

56 it shall be lawful for the President of the United States, on application of the legislature of such state, or of the executive (when the legislature can not be convened) to call forth such a number of the militia of any other state or states as may be applied for, as he may judge sufficient to suppress such insurrection. By this act the power of deciding whether the exigency has arisen upon which the Government of the United States is bound to interfere is given to the President."

Black's Constitutional Law, page 102.

Judge Thomas M. Cooley, in discussing the right of the judicial department of the Government to interfere with the discretionary action of the other departments of the Government, in his work on constitutional law, said:

"Congress may confer upon the President the power to call them (the militia) forth, and this makes him the exclusive judge whether

the exigency has arisen for the exercise of the authority and renders one who refuses to obey the call liable to punishment under martial law." (Cooley's Principles of Constitutional Law, 88.)

But it may be argued by those who contend for the contrary doctrine, to wit: that the acts of the Governor General, with the approval of the Philippine Commission, are not conclusive upon the courts and that none of the foregoing citations are exactly in point, that none of these cases or authors treat of a case exactly like the one presented. We are fortunate, however, in being able to cite, in answer to that contention, the case of Henry William Boyley, where exactly the same question was presented to the Supreme Court of the State of Idaho, which the applicants present here and where the Courts held the doctrine of the cases applied. In the case of Boyle, he had been arrested after the privilege of the writ of *habeas corpus* had been suspended. He applied for a writ of *habeas*
57 *corpus* to the Supreme Court of Idaho, alleging, among other things, in his application:

First. That "no insurrection, riot or rebellion now exists in Shoshone county." And

Second. That "the Governor has no authority to proclaim martial law or suspend the writ of *habeas corpus.*"

In reply to this contention on the part of the applicant Boyle, the Court said:

"Counsel have argued ably and ingeniously upon the question as to whether the authority to suspend the writ of *habeas corpus* rests with the legislative and executive powers of the Government, but from our views of this case, that question cuts no figure. We are of the opinion that whenever, for the purpose of putting down insurrection or rebellion, the exigencies of the case demand it, with the successful accomplishment of this end in view, it is entirely competent for the executive or for the military officer in command, if there be such, either to suspend the writ or disregard it if issued. The statutes of this state (Idaho) make it the duty of the Governor, whenever such a state or condition exists as the proclamation of the Governor shows does exist in Shoshone county, to proclaim such locality in a state of insurrection and to call in the aid of the Military of the state or of the Federal Government to suppress such insurrection and reestablish permanently the ascendency of the Law. It would be an absurdity to say that the action of the executive, under such circumstances, may be negatived and set at naught by the judiciary, or that the action of the executive may be interferred with or imputed by the judiciary. If the courts are to be made a sanctuary, a seat of refuge whereunto malefactors may fall for protection from punishment justly due for the commission of crime, *they* will soon cease to be that palladium of the rights of the citizen so ably described by counsel."

58 "On application for a writ of *habeas corpus,* the truth of recitals of alleged facts in a proclamation issued by the Governor proclaiming a certain county to be in a state of insurrection and rebellion will not be inquired into or reviewed. The action of the Governor in declaring Shoshone county to be in a state of in-

surrection and rebellion, and his action in calling to his aid the military forces of the United States for the purpose of restoring good order and the supremacy of the law, has the effect to put in force, to a limited extent, martial law in said county. Such action is not in violation of the Constitution, but in harmony with it, being necessary for the preservation of government. In such case the Government may, like as individual acting in self-defense, take those steps necessary to preserve its existence. If hundreds of men can assemble themselves and destroy property and kill and injure citizens, thus defeating the ends of government, and the government is unable to take all lawful and necessary steps to restore law and maintain order, the state will then be impotent if not entirely destroyed, and anarchy placed in its stead."

"It having been demonstrated to the satisfaction of the Governor, after some six or seven years of experience that the execution of the laws in Shoshone county through the ordinary and established means and methods was rendered practically impossible, it became his duty to adopt the means prescribed by the statute for establishing in said county the supremacy of the law and insuring the punishment of those by whose unlawful and criminal acts such a condition of things has been brought about; and it is not the province of the courts to interfere, delay or place obstructions in the path of duty pre-cribed by law for the execution, but rather to render him all the aid and assistance in their power, in his efforts to bring about the consum-ation most devoutly prayed for by every good,
59 law-abiding citizen in the state."

In re Boyle, 45 L. R. A. (1899) 832.

The doctrine that whenever the Constitution or a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, such person is to be considered the sole and exclusive judge of the existence of those facts, has been recognized, not only by the Supreme Court of the United States, but by practically all of the Supreme Courts of the different states, and has never been disputed by any respe-table authority. The following cases are cited in support of this doctrine:

Martin *v.* Mott (1827) 12 Wheat. 19, (25 U. S. Rep.)
Luther *v.* Borden (1849) 7 How. 44, 77.
Wilkes *v.* Dinaman, (1849) 7 How. 130, 131.
Murray *v.* Hoboken, &c. Co. (1855) 18 How. 280.
U. S. *v.* Speed (1868) 8 Wall. 83.
Mullen *v.* U. S. (1890) 140 U. S. 245.
Nishimura Ekiu *v.* U. S. (1891) 142 U. S. 660.
Ex parte Field (1862) 5 Blatch. 77, 81 (Fed. Case No. 4761).
Allen *v.* Blunt, 3 Story 745. (Fed. Case No. 216.)
Gould *v.* Hammond, 1 McAll, 237, 239, (Fed. Case 5638).
U. S. *v.* Cotton, (1872) 27 Fed. Case pp. 325, 328.
U. S. *v.* Packages, (1862) 21 Fed. Case, pp. 288, 289.
U. S. *v.* Cemment, (1862) 27 Fed. Case p. 293.
U. S. *v.* Tropic Wind, 28 Fed. Case p. 221.
In re Day, 28 Fed. Case, p. 680.

Hammer *v.* Mason, 24 Ala., 485.
People *v.* Pacheco, (1865) 27 Cal. 223.
Porter *v.* Haight (1873) 45 Cal. 639.
Evansville & C. Ry. Co. *v.* Evansville, 15 Ind. , 421.
Koehler *v.* Hill, 60 Ia. 566.
People *v.* Wayne (1877) 39 Mich. 20.
State *v.* Town of Lime (1877) 23 Minn. 526.
60 People *v.* Parker 3 Nebraska, 432.
Lem Moon Sing *v.* U. S. (1896) 165 U. S. 559, 560.
Kneedler *v.* Lane (1863) 45 Penn. St. 292.
In re Legislative Adjournment (1893) 18 Rhode Island, 834; 22 L. R. A. 716.
Chapin *v.* Ferry (1891) 3 Washington 396; 28 Pac. Rep. 758; 15 L. R. A. 120.
Druecker *v.* Solomon, 21 Wis. 626; 94 Am. Dec. 574, 576.
People *v.* Bissell (1857) 19 Ill. 229, 232, 233.
Sutherland *v.* Governor, 29 Mich. 320, 330. (1874)
Ambler *v.* Auditor General (1878) 38 Mich. 746, 751.
State *v.* Warmoth (1870) 22 La. An. Rep. 1; 13 Am. Rep. 126.
Jonesboro & Co. *v.* Brown (1875) 8 Baxter (Tenn.) 490; 35 Am. Rep. 713.

In the case of the United States *v.* Packages (27 Fed. Case pp. 284, 288) above cited, the court, in discussing the authority of the judicial department of the Government to interfere with the discretionary powers of the executive and legislative, said:

"The doctrine involved has been fully discussed in several cases decided by this court during the last fifteen months, and was virtually settled long ago by the United States Supreme Court. The judiciary, under the Constitution, can not declare war or make peace. It is clothed with no such power, and can not be clothed with it. Whatever power is vested by the Constitution in one department of the Government can not be usurped by another. If one should wholly refuse to act, or should undertake to divest itself, or abdicate its legitimate functions, it would by no means follow that another department, expressly limited to specific duties, would thereby acquire ungranted powers. The abdication of executive functions by the executive, for instance, would not constitute the judicial
61 the executive department of the country; nor would a failure or refusal of the legislative to pass needed statutes constitute the executive the law-making power. Each department has its true boundaries prescribed by the Constitution, and it can not travel beyond them."

U. S. *v.* Ferrera (1851) 13 How. 40.
Little *v.* Bareme (1804) 2 Cranch. 170.

"The condition of peace, or war, public or civil, in a legal sense, must be determined by the political department, not the judicial. The latter is bound by the decision thus made. The Act of 1795 and the Act of July 13th, 1861, vests the President with the power to de-

termine when insurrection exists, and to what extent it exists. The United States Constitution vests Congress with the power 'to provide for calling forth the militia to execute the laws of the Union, to suppress insurrection, and repel invasion; to declare war * * * and make rules concerning captures on land — water.' In the execution of that power, Congress passed the act cited above."

"By the Act of 1795, the Supreme Court says: 'The power of deciding whether the exigency had arisen upon which the Government of the United States is bound to interfere, is given to the President.' * * * After the President has acted, is a Circuit Court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? * * * If the judicial power extends so far, the guaranty contained in the Constitution of the United States is a guaranty of anarchy, and not of order. Yet if this right does not reside in the courts when
62 the conflict is raging; if the judicial power is at that time bound to follow the decision of the political (department of the Government), it must be equally bound when the contest is over. At all events, it (the power to decide) is conferred upon him (the President) by the Constitution and laws of the United States, and must therefore be respected and enforced in its judicial tribunals."

Luther *v.* Borden (1849) 7 How. 43, 44.
Martin *v.* Mott (1827) 12 Wheat. 29-31.

The same doctrine has been uniformly maintained from the commencement of the Government. The absurdity of any other rule is manifest. If during the actual clash of arms, the courts were rightfully hearing evidence as to the fact of war, and either with or without the said juries, determining the question, they should have power to enforce their decision. In case of foreign conflicts neither belligerant would be likely to yield to the decision; and in case of insurrection, the insurgents would not cease their rebellion in obedience to a judicial decree. In short, the status of the country as to peace or war is legally determined by the political (department of the government) and not by the judicial department. When the decision is made the courts are concluded thereby, and bound to apply the legal rules which belong to that condition. The same power which determines the existence of war or insurrection, must also decide when hostilities have ceased—that is, when peace is restored. In a legal sense the state of war or peace is not a question *in pais* for courts to determine. It is a legal fact, ascertainable only from the decision of the political department.

The Fortune (1818) 3 Wheat. 246.
U. S. *v.* Palmer (1818) 3 Wheat. 610.
Nuestra Señora &c. (1819) 44 Wheat. 497.
63 Santisima Trinidad (1822) 7 Wheat. 283.
Rose *v.* Himely (1806) 4 Cranch, 241.
Foster *v.* Nelson (1829) 2 Peters, 253.

Under the Act of Congress of July 13th, 1861, the President of the United States, on the 16th day of August, 1861, proclaimed that the State of Tennessee was in a state of insurrection. The courts, in discussing the rights of the President to decide upon the necessities of such proclamation, and the period within which it should continue, said:

"The legal status thus determining must remain so long as the condition of hostilities continues. He (the President) has never made a counter proclamation, nor has peace been officially announced. As a legal condition that status (of insurrection) is independent of actual daily strife in arms. A legal condition of hostilities may exist long after the last battle has been fought between the opposing armies. That condition (of insurrection or rebellion) ceases when peace is concluded through competent authority; not before. * * * Within any construction which could be very well given to the President's proclamation, no part of that state (Tennessee) maintains as yet a loyal adhesion to the Union and Constitution. It is the duty of the President, however, to decide that point. Until he declares to the contrary, the court must hold that the legal condition of hostility continues. The exceptions in the proclamation, as far as made by the President, courts can and must enforce. But if it be correct, that by the terms of the proclamation, the President intended to devolve on the courts the duty of determining judicially the status of a state or part of a state by an inquiry into its loyalty or its occupation from time to time by the United States forces, irrespective of a decision thereon by
64 the executive, still courts could not then acquire the power. The limits upon their constitutional and legal functions could not thus be enlarged Political power could not be so delegated to the courts. They (the courts) can not be charged with any duties not judicial; 'judicial power' alone is invested in them (the courts) under the Constitution."

U. S. *v.* Packages (1862) 27 Fed. Case pp. 288, 289.

In the case of Druecker *v.* Solomon (21 Wis. 621; 94 Am. Dec. 571, 576, 577) the Supreme Court of Wisconsin, in an action for false imprisonment for the arrest and detention during a state of insurrection &c., the court cites and approves of the doctrine laid down by the Supreme Court of the United States in the case of Martin *v.* Mott (12 Wheat. 19) and holds that the action of the political department of the Government in such cases is final and conclusive against the judicial department.

John Marshall, for many years Chief Justice of the Supreme Court of the United States, in discussing the right of one department of the Government to interfere with the discretionary powers of another, said, in the case of Marbury *v.* Madison (1803) 1 Cranch. 137, 164;

"By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he has to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.

* * * The subjects are political; they represent the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the Act of Congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to perform precisely to the will of the President; he is the mere organ by whom that will is indi-
65 cated. The acts of such an officer, as an officer, can never be examined by the courts. * * * The conclusion from this reasoning is that where the heads of departments are the political and confidential agents of the executive, merely to execute the will of the President or rather to act in cases in which the executive possesses a constitutional or a legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable."

In the case of Rice *v.* Austin (19 Minn. 103) the Supreme Court of Minnesota held that "the judical and executive departments of the Government are distinct and independent and neither is responsible to the other for the performance of its duties and neither can enforce the performance of the duties of the other." It may be said that in Minnesota this decision was based upon a constitutional provision. This is true, but the fact that the people of the state of Minnesota, by constitutional provision prohibited one independent department of the Government from interfering or attempting to administer the duties of another, all the more reenforces the doctrine contended for here. Many of the States do permit the judicial department by mandamus to direct the executive department to perform purely ministerial duties. In Minnesota, however, the judicial department will not attempt to coerce the performance of even ministerial duties on the part of the executive.

In the case of Luther *v.* Borden (7 How. 44) it was held that the decision and determination of matters of a purely political character by the executive or legislative department of the Government was binding on every other department of the Government and could not be questioned by a judicial tribunal. The dangers and difficulties which would grow out of the adoption of a contrary rule are pointed out by Chief Justice Taney in this case clearly and ably
66 Chief Justice Taney, referring to the power given to the President with reference to the right to decide whether it was necessary, on account of a possible invasion to call out the militia, said:

"By this Act (Act of Congress of 1795) the power to decide whether the exigency had arisen upon which the Government of the United States is bound to interfere is given to the President. * * * After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision is right? Can the court, while the parties are actually contending in arms for the possession of the government, call witnesses before it and inquire which part represent the majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the

troops in the service of the United States or the Government which the President was endeavoring to maintain. If the judicial power extends so far, the guaranty contained in the Constitution of the United States is a guaranty of anarchy and not of order. Yet if this right does not reside in the court when the conflict is raging, if the judicial power is at that time bound to follow the decision of the political, it must be equally binding when the contest is over."

"It is said that this power in the President is dangerous to liberty and may be abused. All power may — abused if placed in unworthy hands; but it would be difficut, we think, to point out any other hands in which power would be more safe, and at the same time equally effectual. When citizens of the same state are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prom-t or it is of little value. The ordinary course of proceedings in the courts of justice would be utterly unfit for the crisis, and the elevated
67 office of the President, chosen as he is by the people of the United States, and the high responsibility he can not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against the wilful abuse of power as human prudence and foresight could well provide. *At all events it is conferred upon him by the Constitution and laws of the United States and must, therefore, be respected and enforced in its judicial tribunals.*"

Shief Justice Taney here cites approvingly the case of Martin *v.* Mott.

In the case of Franklin *v.* State Board Examiners, (23 Cal. 173, 176) the Supreme Court of California decided "That the political department of a state government is the sole judge of the existence of war or insurrection, and when it declares either of these emergencies to exist, its action is not subject to review or liable to be controlled by the judicial department of the State."

In this case the court cited the cases of Martin *v.* Mott and Luther *v.* Borden.

This same doctrine was again recognized by the Supreme Court of California in the case of the People *v.* Pacheco, (27 Cal. 175, 223), not only resting its decision upon the case of Franklin *v.* State Board of Examiners, but also again cited and confirmed the case of Martin *v.* Mott. Luther *v.* Borden and Vanderheyden *v.* Young, 11 Johnson (N. Y.) 157.

Chief Justice Marshall, in the case of McCullough *v.* State of Maryland, (4 Wheat. 24) says:

"We think the sound construction of the Constitution must allow the national legislature that discretion with respect to the means by which the powers it confers are carried into execution which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people.
68 * * * Such being the case, the determination of these questions by the political department of the Government must also necessarily be conclusive."

Chief Justice Taney, in the case of *ex parte* Marryman, 17 Federal

Cases, 144, (Fed. Case No. 9,487) said, in speaking of the power of the courts:

"It is true that in the case mentioned, Congress is of necessity the judge of whether the public safety does or does not require it (the suspension of the writ of *habeas corpus*) and their judgment is conclusive."

Chief Justice Taney, in the same decision, quotes the following language of Mr. Justice Story approvingly:

"It would seem as the power is given to Congress to suspend the writ of *habeas corpus* in the case of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body."

In the case of McCall *v.* McDowell (15 Federal Cases, p. 1235, Federal Case 8673), Judge Dady said:

"When the occasion arises—rebellion or invasion—whether the 'public service' requires the suspension of the writ or not is confided to the judgment of Congress, and their action in the premises is conclusive upon all courts and persons."

"The suspension enables the executive, without interference from the courts or the law, to arrest and imprison persons against whom no legal crime can be proved, but who may, nevertheless, be effectively engaged in forming the rebellion or inviting the invasion, to the im-inent danger of the public safety."

In the case of *ex parte* Field (5th Blatchford, 63) this same question arose in the State of Vermont, and the Supreme Court of
69 that state, relying upon the decision of Mr. Justice Story in Luther *v.* Borden and that of Chief Justice Taney in Martin *v.* Mott, decided that the President is the exclusive judge of the existence of the exigency authorizing him to call forth the militia and declare martial law, in pursuance of the power conferred on him by Act of Congress of 1795.

Judge Emmons, in the case of United States *v.* 1500 Bales of Cotton (Fed. Case No. 15,958), in discussing this general question said, quoting from a decision of Chief Justice Chase: "The belligerent relation having once been recognized by the political power, all the people of each state or district in insurrection must be regarded as enemies until, by the action of the *legislative and executive,* that relation is th-roughly and permanently changed.

"The statute devolves upon the President the political duty of determining whether armed force should be called out to put down insurrection in the states. It was for him to decide when the exigency occur-ed. The courts had no concern with it" * * * "Whether there was any necessity for the exercise of the power of the President to call out the militia the court could not determine. His decision was final. * * * If the judicial powers are thus extended, the guaranty in the Constitution of a republican form of government was a guaranty of anarchy, not of order. Equally incongruous results would follow if the courts, instead of the Government, were to decide when hostilities are ended and when trade and intercourse should be resumed."

Not only has it been decided in numerous cases that the
70 power to call out the militia and to suspend the writ of *habeas corpus* is entirely within *hte* discretion of the legislative and executive branches of the government, but, when the executive and legislative departments have decided that the conditions exist justifying these acts, the courts will presume that such conditions continue to exist until the same authority (legislative etc.)' have decided that such conditions no longer exist.

Judge Dillon, in the case of Philips *v.* Hatch, (Fed. Case No. 11,094) said:

"From the nature of the question, from the fair implication of the Act of July 13th, 1861, (an act authorizing the suspension of the writ of *habeas corpus*) from the confusion that would ensue from any other rule, it is the opinion of the court that the rebellion must be considered as in existence until the President declared it at an end in a proclamation."

Judge Emmons, in the above case, discussing this same question, said:

"These unquestioned doctrines have not been extemporized for the modern and exceptional exigencies of the late Rebellion. They belong to the jurisprudence of all countries and were adopted as part of that of our own from its earliest history. Our most conservative Judges, Marshall, Story and Taney, have been foremost in announcing them. No citizen would challenge the justness and necessity of this rule. Judges have their peculiar duties, which, if faithfuly and learnedly studied, have little tendency to make them familiar with
current and rapidly changing conditions upon which depend
71 the important political question of whether it is safe to relax, on the instant, military rule and restore intercourse and trade."

The following cases are also cited:

Brown *v.* Hist, Fed. Case No. 2011.
United States *v.* 100 Barrels of Cement, Fed. Case No. 15945.
Gelston *v.* Hoyt, 3 Wheat. 246.
The Divina Pastora, 4 Wheat. 52.
The Santisima Trinidad, 7 Wheat. 283.
Rose *v.* Himely, 4 Cranch, 241.
Foster *v.* Nelson, 12 Peters, 511.
Stewart *v.* Kahn, 11 Wallace, 493.
Mrs. Alexander's Cotton, 2 Wallace, 404.

For a general discussion, see
6th American Law Register, 766;
4 Chicago Legal News, 245.

No Government, past or present, has more carefully and watchfully guarded and protected, by law, the individual rights of life and property of its citizens than that of the Government of the United States and of the various States of the Union. Each of the three departments of the Government have had separate and distinct functions to perform in this great labor. The history of the United States, covering more than a century and a quarter, discloses the fact

that each department has performed its part well. No one department of the Government can or ever has claimed within its
72 discretionary power, a greater zeal than the others in its desire to promote the welfare of the individual citizen. They are all joined together in their respective spheres, harmoniously working to maintain good government, peace and order, to the end that the rights of each citizen be equally protected. No one department can claim that it has a monopoly of these benign purposes of the Government. Each department has an exclusive field within which it can perform its part, within certain discretionary limits. No other department can claim a right to enter these discretionary limits and assume to act there. No presumption of an abuse of *these discretionary powers* by one department will be considered or entertained by another. Such conduct on the part of one department, instead of tending to conserve the Government and the rights of the people, would directly tend to destroy the confidence of the people in the Government and to undermine the very foundations of the Government itself.

For all of the foregoing reasons, the application for the writ of *habeas corpus* should be denied and it is so ordered.

(Signed) E. FINLEY JOHNSON.

Concurring:

(Signed) C. S. ARELLANO.
" VICTORINO MAPA.
" A. C. CARSON.

73 No. 2808.

Dissenting Opinion.

WILLARD, *J.*:

The question in the case is this: Have the Governor General and the Commission power to suspend the writ of *habeas corpus* when no insurrection in fact exists? If tomorrow they should suspend the writ in Manila, would that suspension be recognized by the courts? That in such a case they ought not to suspend the writ and that where no insurrection in fact exists they would have no right to do so, are propositions which have no bearing upon the case. The question is, Have they the power to do it?

Prior to the passage of the Act of Congress of July 1st, 1902, the Commission had that power. They could suspend the writ, take it away entirely from certain provinces, or repeal entirely the law which authorized it to be issued. They had absolute control over it. (*In re* Calloway, 1 Phil. Rep. page 11.)

By the decision of the majority in this case the Governor General and the Commission still have that power. The effect of this decision is to give them the same power which the Commission exercised before the passage of the Act of Congress of July 1st, 1902. In other words, that part of the Act which relates to the writ of *habeas corpus* has produced no effect. It is repealed by this decision, and Congress accomplished nothing by inserting it in the law. No construction which repeals it should be given to this

article. If a given construction leads to that result it seems
74 to me that it must be certain that the construction is wrong. No other argument to prove that it is wrong is needed. Congress must have intended that this provision should produce some effect. To hold that it has produced no effect is to defeat such intention.

But it is said that by the terms of the act, while the Governor General and the Commissioners have the power to suspend, the writ, they should not do it except in cases where insurrection in fact exists, and they being men of character and integrity, would not do it except in such cases. As the government is at present constituted this is undoubtedly true. This argument, however, is fully answered by what was said by the Supreme Court of the United States in the case of *Ex-Parte* Milligan, 4 Wallace 2, 125:

"This nation, as experience has proved, can not always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln."

With the exception of one case decided by the Supreme Court of Idaho, no authorities are presented involving directly the construction of the provision of the Constitution of the United States relating to the suspension of the writ of *habeas corpus,* which provision is substantially the same as the one embodied in the Act of Congress of July 1st, 1902.

That the judicial power has no authority to interfere with the executive power in the discharge of the duties imposed upon the latter by law is a proposition that no one denies. The question however, in this case is, Has the law conferred upon the executive the power to decide exclusively whether a state of insurrection exists or not?

75 In the case of Martin *v.* Mott, 12 Wheat. 19, 28, the court said that the construction which it gave to the Act of Congress authorizing the President to call out the militia "necessarily results from the nature of the power itself, and from the manifest object contemplated by the Act of Congress"—that is to say, in determining what the words of the law meant they relied almost entirely upon the nature of the power given by the law, and the object contemplated by it. Those are the things which should be considered in determining what construction is to be given to the provisions relating to *habeas corpus.* The power given by an Act of Congress to the President, who under the Constitution is the Commander in Chief of the Militia, when called into the service of the United States, to call such men into military service upon a sudden emergency, is in my opinion distinctly different from the power given by the Constitution to Congress to suspend the writ of *habeas corpus* so as to prevent a person already in custody from having the cause of his detention inquired into by a court of justice. The reasons which would lead a court to say that the former power had been unreservedly entrusted to the President should not, I think, be con-

sidered as controlling, when the extent of the latter power is under discussion.

The effect of the suspension of the writ of *habeas corpus*, and as it seems to me its manifest purpose, is to allow the government to commit an illegal act. It allows it to imprison a person who has committed no offense, and for whose arrest and detention no warrant has been issued by any competent court, and it leaves that person without redress at the time for this unlawful act. In the case at bar it appears from the return of the respondents that Barcelon is deprived of his liberty without due process of law in violation
76 of a provision of this same Act of Congress.

The privilege of the writ of *habeas corpus* was given to protect the citizen from such arbitrary and illegal acts of either the executive or the legislative power; the latter, that department which, according to Mr. Madison in No. 47 of The Federalist, "is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."

It is probable that the people in adopting the Constitution, intended to give up to these departments of the government against which they needed protection, perhaps the most important right which could furnish that protection?

I do not think that the authors of the Constitution, or the authors of the Act of Congress intended to so place this right in the hands of these two departments that whether it should or should not be enjoyed by the citizens would depend exclusively upon their will and pleasure.

For the reasons above stated I dissent from the opinion of the court.

(Signed) CHARLES A. WILLARD.

77 UNITED STATES OF AMERICA:

In the Supreme Court of the Phillipine Islands.

R. G. No. 2808.

In the Matter of the Petition of FRED C. FISHER and CHARLES C. COHN for the Issuance of the Writ of *Habeas Corpus* in Favor of FELIX BARCELON.

Now come the petitioners Fred C. Fisher and Charles C. Cohn, for themselves and in representation of Felix Barcelon, and file their exception against the judgment given and made in the above entitled action denying the petition for the issuance of a writ of *habeas corpus* in favor of the said Felix Barcelon. Manila, P. I., Oct. 3rd, 1905.

(Sgd.) FRED C. FISHER,
(Sgd.) CHARLES C. COHN,
Petitioners and Attorneys for Felix Barcelon.

Filed in the Clerk's office of the Supreme Court, Philippine Islands, this 3rd of October, 1905, 4.45 p. m.

J. E. BLANCO, *Clerk*,
By H. D. McGEORGE, *Deputy*.

OCTOBER 6, 1905.

This Supreme Court, in its session of the 5th day of the present month, ordered the following:

"Having considered the writing filed by Messrs. Fisher
78 and Cohn in the matter of the pe-ition for the writ of *habeas corpus* in favor of Felix Barcelon, excepting to the judgment given and made in said proceeding denying the aforesaid petition, the Court, duly informed, ordered that the exception of the petitioners be admitted for all lawful purposes and that the same be united to the Record, in order that it may appear of record and for other purposes," of which I notify you for your information.

Very respectfully,

(Sgd.) J. E. BLANCO,
Clerk Supreme Court, P. I.

To the Attorney General and to Messrs. Fisher and Cohn.

79 UNITED STATES OF AMERICA, *Philippine Islands:*

In the Supreme Court of the Philippine Islands.

No. 2808.

In the Matter of the Application of FRED C. FISHER and CHARLES C. COHN for a Writ of *Habeas Corpus* in Behalf of FELIX BARCELON.

Petition for Writ of Error.

Fred C. Fisher and Charles C. Cohn, the above named applicants, conceiving themselves aggrieved of the order and decree made and entered in the above entitled cause under the date of September 30th, 1905, wherein and whereby it was and is ordered, adjudged and decreed that the writ of *habeas corpus* prayed for on behalf of said Felix Barcelon be denied, hereby pray for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the Philippine Islands in order that the said order and decree may be revised by the said Supreme Court of the United States upon the assignment of errors which is presented with this petition, and they pray that this their petition for said writ of error may be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree were duly authenticated, may be transmitted to the said Supreme Court of the United States.

And the petitioners will ever pray.

October 19th, 1905.

FRED C. FISHER,
CHARLES C. COHN,
Attorneys for Applicant.

Service of a copy of this petition for writ as of Oct. 19th, 1905.

L. R. WILFLEY,
R. D. B.,
Att'y Gen.

Filed in the Clerk's office of the Supreme Court of the Philippine Islands this 3rd day of January 1906.

J. E. BLANCO, *Clerk.*

80 UNITED STATES OF AMERICA, *Philippine Islands:*

In the Supreme Court of the Philippine Islands.

No. 2808.

In the Matter of the Application by FRED C. FISHER and CHARLES C. COHN for a Writ of *Habeas Corpus* in Behalf of FELIX BARCELON.

Assignment of Errors.

The applicants file the following assignment of errors upon which they will rely for their prosecution of the writ of error in the above entitled cause.

I.

The Supreme Court of the Philippine Islands erred in denying the writ of *habeas corpus* as prayed for by petitioners.

II.

The Supreme Court of the Philippine Islands erred in holding that said court is not competent to try as a question of fact, the question of whether or not there exists an insurrection, rebellion or invasion, in order to determine the validity of the order suspending the privilege of the writ of *habeas corpus* in the place where the prisoner is detained.

III.

The Supreme Court of the Philippine Islands erred in holding that by the act of Congress of July 1. 1902 the Governor of the Philippine Islands, together with the United States Philippine Commission are the sole and exclusive judges of when and where in
81 the Philippine Islands, the privileges of the writ of *habeas corpus* may be validity suspended.

IV.

The Supreme Court of the Philippine Islands erred in holding that by the Act of Congress of July 1, 1902, the action of the Governor of the Philippine Islands, together with the United States Philippine Commission, in suspending the writ of *habeas corpus* in certain parts of said Islands, is not subject to judicial review and that said action is not subject to be annulled in the event that in-

surrection, invasion or rebellion does not exist as a fact in said parts of said Islands.

In order that the foregoing statement of errors may be and appear of record, the applicants present the same to the Court, and pray that such disposition may be made thereof as in accordance with law and the statutes of the United States in such cases made and provided.

All of which is respectfully submitted.

FRED C. FISHER,
CHARLES C. COHN,
Attorneys for Applicant.

Copy received as of Oct. 19, 1905.

L. R. WILFLEY,
R. D. E.,
Att'y Gen.

Filed in the Clerk's office of the Supreme Court of the Philippine Islands this 3rd day of January 1906.

J. E. BLANCO, *Clerk.*

82 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorale Judges of the Supreme Court of the Philippine Islands, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a cause which is in the said Supreme Court of the Philippine Islands, before you, or some of you, wherein Fred C. Fisher and Charles C. Cohn appear as applicants and appellants on behalf of Felix Barcelon for a writ of *habeas corpus* to be directed against Colonel David J. Baker, Jr. and Captain John Doe Thompson, of the Philippines Constabulary, a manifest error hath happened to the great damage of the said applicants and appellants, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, we command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 3rd day of March, 1906, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 3 day of January,
83 in the year of our Lord nineteen hundred and six.

J. E. BLANCO,
[SEAL.] *Clerk Supreme Court P. I.*

The foregoing writ of error is allowed and it shall operate as a supersedeas of the judgment complained of.

E. FINLEY JOHNSON,
[SEAL.] *Associate Justice of the Supreme Court of the Philippine Islands.*

Filed in the Clerk's office of the Supreme Court of the Philippine Islands this 3rd day of January, 1906.

J. E. BLANCO, *Clerk.*

84 UNITED STATES OF AMERICA, *ss:*

To Colonel David J. Baker, Jr., and Captain John Doe Thompson:

You and each of you are hereby cited and adminished to be in and appear at the Supreme Court to be holden at Washington, within sixty days from the date of this citation, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Philippine Islands, wherein Fred C. Fisher and Charles C. Cohn appear as applicants for a writ of *habeas corpus* on behalf of Felix Barcelon directed against Colonel David J. Baker, Jr. and Captain John Doe Thompson to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 3rd day of January, in the year of our Lord nineteen hundred and six.

E. FINLEY JOHNSON,
[SEAL.] *Associate Justice of the Supreme Court of the Philippine Islands.*

I admit the receipt of the above citation and accept service thereof this 13th day of January, 1906.

L. R. WILFLEY,
Atty. Gen., Attorney for Baker and Thompson.
Per R. D. B.

Filed in the Clerk's office of the Supreme Court of the Philippine Islands this 15th day of January, 1906.

J. E. BLANCO, *Clerk.*

85 UNITED STATES OF AMERICA, *Philippine Islands.*

In the Supreme Court of the Philippine Islands.

In the Matter of the Application of FRED C. FISHER and CHARLES C. COHN for a Writ of *Habeas Corpus* in Behalf of FELIX BARCELON.

Bond on Writ of Error.

Know all men by these presents, That we, F. C. Fisher and Charles C. Cohn, as principals, and Enrique Brias and A. R. Roxas, as sureties, are held and firmly bound unto the Government of the

Philippine Islands in the full and just sum of Five Hundred Dollars ($500.00) U. S. Currency, for the payment whereof, to the Government of the Philippine Islands, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 10th day of January, one thousand nine hundred and six.

Whereas, lately, at a session of the Supreme Court of the Philippine Islands, in a cause pending in said Court wherein application was made by F. C. Fisher and C. C. Cohn in behalf of Felix Barcelon for writ of *habeas corpus,* on the 30th day of September, 1905, and the said applicants having sued out a writ of error from the Supreme Court of the United States to the Supreme Court of the Philippine Islands to reverse the order and decree in said cause,

Now, the condition of the above obligation is such that if the said applicants shall prosecute the said writ of error to effect, and
86 shall answer all damages and costs that may be awarded against them if they fail to make their plea good, then the above obligation is to be void; otherwise to remain in full force and virtue.

F. C. FISHER.
CHARLES C. COHN.
ENRIQUE BRIAS.
A. R. ROXAS.

UNITED STATES OF AMERICA, *Philippine Islands, ss:*

At the City of Manila, Enrique Brias and A. R. Roxas, sureties on the within obligation, being duly sworn, depose and say, each for himself, that he is a resident and property holder in the City of Manila and that he is worth more than the amount expressed in the said obligation as a penal sum, over and above all his debts and obligations exclusive of property exempt from taxation.

ENRIQUE BRIAS.
A. R. ROXAS.

Subscribed and sworn to before me this 10th day of January, 1906, with cedulas Nos. 14175 and 14178, dated January 27, 1905, respectively.

FLORENCIO GONZALES DIAS,
[SEAL.] *Notario Publico, El Nombramiento Termina el 31 de Diciembre de* 1906.

(Po. 20 Stamp.)

Filed in the Clerk's office of the Supreme Court of the Philippine Islands this 15th day of January, 1906.

J. E. BLANCO, *Clerk.*

Approved:
(Sgd.) E. FINLEY JOHNSON,
Associate Justice Supreme Court of Philippines.

87 UNITED STATES OF AMERICA, *Philippine Islands.*

In the Supreme Court of the Philippine Islands.

In the Matter of the Application of FRED C. FISHER and CHARLES C. COHN for Writ of *Habeas Corpus* in Behalf of FELIX BARCELON.

Stipulation.

It is hereby stipulated by and between counsel in the above entitled cause that the transcript of Record therein, on writ of error from the Supreme Court of the United States to the Supreme Court of the Philippine Islands shall be made up of the following papers:

1. Petition for writ of *habeas corpus* and exhibits.
2. Order to show cause.
3. Amended return to order to show cause and exhibits.
4. Authority to appear for applicant.
5. Order denying writ.
6. Exception to order.
7. Assignment of errors.
8. Petition for allowance of writ of error.
9. Writ and order.
10. Bond on writ of error.
11. Stipulation as to making up Record.

FRED C. FISHER,
CHARLES C. COHN,
Attorneys for Applicant.
L. R. WILFLEY,
R. D. B.,
Attorneys for Respondent.

Filed in the Clerk's office of the Supreme Court of the Philippine Islands this 15th day of January, 1906.

J. E. BLANCO, *Clerk.*

88 UNITED STATES OF AMERICA, *Philippine Islands.*

In the Supreme Court of the Philippine Islands.

No. 2808.

In the Matter of the Application by FRED C. FISHER and CHARLES C. COHN for Writ of *Habeas Corpus* in Behalf of FELIX BARCELON.

Stipulation.

It is hereby stipulated and agreed by and between counsel in the above entitled cause that the transcript of record therein on writ of error to the Supreme Court of the United States contains full, true

and correct copies of all the papers appertaining to said cause which were designated in the stipulation of counsel filed in said cause.

F. C. FISHER,
CHARLES C. COHN,
Counsel for Applicant.
L. R. WILFLEY,
Counsel for Respondent.

Manila, January 15th, 1906.

Filed in the Clerk's office of the Supreme Court of the Philippine Islands this 15th day of January, 1906.

J. E. BLANCO, *Clerk.*

89 UNITED STATES OF AMERICA, *ss:*

In obedience to the foregoing writ of error, I hereby transmit to the Supreme Court of the United States a true and complete transcript in English of the record and proceedings in the foregoing-entitled cause, this 16th day of January, 190–.

J. E. BLANCO,
[SEAL.] *Clerk Sup. Crt. P. I.*

Endorsed on cover: File No. 20,111. Philippine Islands Supreme Court. Term No. 609. Fred C. Fisher and Charles C. Cohn on behalf of Felix Barcelon, plaintiffs in error, *vs.* Colonel David J. Baker, Jr., and Captain John Doe Thompson. Filed March 1st, 1906. File No. 20,111.

FILE COPY.

FILED
MAR 17 1906
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 609. 214

FRED C. FISHER and CHARLES C. COHN,
on behalf of Felix Barcelon,
Plaintiffs in Error,
against

COLONEL DAVID J. BAKER, JR., and
Captain John Doe Thompson.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

MOTION TO ADVANCE.

COUDERT BROTHERS,
Attorneys for Appellant.

FREDERIC R. COUDERT,
Of Counsel.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1905.

No. 609.

FRED C. FISHER and CHARLES C. COHN, on behalf of FELIX BARCELON, Plaintiffs in Error,

AGAINST

COLONEL DAVID J. BAKER, JR., and CAPTAIN JOHN DOE THOMPSON.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

MOTION TO ADVANCE.

And now, on the 19th day of March, 1906, comes Frederic R. Coudert, of counsel for the appellant above named, and moves this Honorable Court that the above-entitled cause be advanced upon the docket and set down for hearing upon such early day as shall be most convenient to the Court.

I.

This is a writ of error (Rec., p. 47) to the Supreme Court of the Philippine Islands bringing here for review a judgment denying an application for a writ of *habeas corpus* made by the petitioners Fisher and Cohn on behalf of Felix Barcelon,

said judgment being filed in the office of the Clerk of the Supreme Court of the Philippine Islands on the third day of October, 1905 (Rec., p. 45).

Plaintiff in error claimed that he was unlawfully detained and petitioned the Supreme Court of the Philippine Islands for a writ of *habeas corpus*, which writ was refused by the said Court on the ground that under an order of the Philippine Commission the right to the writ of *habeas corpus* had been suspended.

II.

The petition for the writ alleged that Felix Barcelon was detained and restrained of his liberty by John Doe Thompson, of the Philippine Constabulary, acting under and in pursuance of order of David J. Baker, Jr., Colonel of the Philippine Constabulary, at the Town of Batangas, in the Province of Batangas, in the Philippine Islands; that said detention and restraint were wholly without authority and further "that "there has not existed at any of the times in the petition "mentioned and does not now exist in said Province of "Batangas or in any part thereof, rebellion, insurrection or in-"vasion, or any of them, in any form or degree; and that all "of the courts of law organized and provided by law for the "Province of Batangas have been at all of the times herein-"above mentioned, in the full and complete exercise of their "functions without interruption of any nature or kind" (Rec., p. 2).

The answer to the petition for the writ of *habeas corpus* admitted the detention of said Barcelon, but denied

> "the right of this Court to inquire into the reasons therefor by virtue of the said resolution of the United States Philippine Commission and the proclamation of the Governor General issued by authority of the same suspending the privileges of the writ of *habeas corpus* in the Provinces of Cavite and Batangas" (Rec., p. 24).

III.

Section 5, of the Act of Congress of July 1, 1902 (Rec., p. 25), provides :

> "That the privileges of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion, insurrection or invasion the public safety may require it, in either of which events the same may be suspended by the President or by the Governor General, with the approval of the Philippine Commission, whenever during such period the necessity for such suspension shall exist."

The Supreme Court of the Philippine Islands has held (WILLARD, J., dissenting), that in view of said order of suspension, the writ would not issue and that the Court was without jurisdiction to inquire into the question of whether or not rebellion, insurrection or invasion in fact existed or whether the Courts were open and in their usual and normal operation.

No reference is made in the opinion of the Court to the case of *ex parte* Milligan, 4 Wall., 2, which undersigned counsel believes to be determinative of the question here involved.

IV.

The said petitioner is still in custody, and the question here involved is of great public interest and importance.

Counsel, therefore, respectfully moves this Honorable Court to advance the said case for argument and determination at an early date, in accordance with Rule 26, providing that criminal cases may be advanced by leave of the Court, upon the motion of either party, and also because this case "involves a matter of general public interest."

V.

I am authorized to say that the Solicitor General consents to this motion, and joins in my request that the case be advanced.

Dated New York, March 14, 1906.

FREDERIC R. COUDERT,
Of Counsel for Appellant.

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JAMES H. McKENNEY

No. 214.

Supreme Court of the United States.

FRED C. FISHER and CHARLES C. COHN, on behalf of FELIX BARCELON,

Plaintiffs in Error,

against

COLONEL DAVID J. BAKER, JR., and CAPTAIN JOHN DOE THOMPSON,

Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

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IN THE

Supreme Court of the United States.

FRED C. FISHER and CHARLES C. COHN, on behalf of FELIX BARCELON, Plaintiffs in Error, AGAINST COLONEL DAVID J. BAKER, JR., and CAPTAIN JOHN DOE THOMPSON, Defendants in Error.	Brief for Plaintiffs in Error.

Statement of the Case.

This is a writ of error to review an order or judgment of the Supreme Court of the Philippine Islands denying an application for a writ of *Habeas Corpus*. A petition on behalf of Felix Barcelon, the prisoner, was presented on August 2d, 1905, and on the following day an order to show cause why the writ should not issue was granted, returnable August 4th, 1905. On the return day the respondents filed an answer which they subsequently amended. By their amended answer they admitted the detention and set up the following defenses:

A. That the court was without jurisdiction or authority to issue the writ because the privilege thereof had been suspended by the Governor by proclamation of January 31st, 1905, pursuant to the authorization of the Philippine Commission as expressed in their resolution of the same date.

B. Without waiving the question of jurisdiction the respondents also answered on the merits, and alleged

1st. That the petitioners were not authorized by Barcelon to act for him, and that Barcelon was "satisfied to remain with Captain Thomson," and

2d. That it was necessary to keep Barcelon in custody to protect him against intimidation.

The petitioners replied to this answer by producing a specific authorization from Barcelon approving of all their proceedings on his behalf.

On September 30, 1905, the Court rendered a decision and judgment denying the application on the ground of lack of jurisdiction or authority by reason of the suspension of the privilege of the writ, and declined to go into the merits or to consider the petitioners' allegation that no insurrection in fact existed at the time. This was by a divided court, Mr. Justice WILLARD dissenting in an able and vigorous opinion (Rec., p. 42). This judgment now comes before this court for review on writ of error.

Statement of Facts.

The facts material to a determination of this cause, as they appear from the record herein and from public documents of which this court will take judicial notice, are briefly as follows:

In the autumn of 1904 there was an outbreak of "ladronism" in the provinces of Batangas and Cavite. Bands of "*ladrones*," or robbers and outlaws, infested portions of these provinces, and raided outlying villages, plundering and ravaging. They proved too formidable for the native constabulary, and it was necessary to employ United States troops to extirpate them (See Report of Phil. Comm. for 1905, Part I., page 56). To aid the operations of the troops, the Civil Governor, in accordance with a resolution of the Philippine Commission, suspended the privilege of the writ of *habeas corpus* in the provinces of Cavite and Batangas, by proclamation dated January 31st, 1905 (Rec., pp. 10, 11).

So successful were the efforts of the authorities that on April 30, 1905, Colonel Baker, one of the defendants in error, being then in command of the Provisional District including the provinces in question, telegraphed to the Provincial Governor of Batangas, offering his congratulations "on the freedom of Batangas from ladronism." This despatch is contained in Gov. Aguilera's report to the Civil Governor (Phil. Comm. Report 1905, Part I., p. 173) and is printed in full as an appendix to

this brief (App. 1, p. 21). In this same report the Provincial Governor states under date of August 28th, 1905: "The most absolute tranquillity reigns throughout this province." On August 15, 1905, the Provincial Governor of Cavite reported: "Ladronism has for the present disappeared from the province; in any event it can be better handled by the regularly organized forces of the civil government (Phil. Comm. Rep. 1905, Part I., p. 216). By the middle of July, 1905, of all the *ladron* bands, "there remained only Felizardo, Montalon and De Vega, with perhaps 20 followers with guns" and the United States troops were withdrawn (Do., p. 58). This is confirmed by Colonel Baker's report to the Adjutant General of the Philippine Constabulary dated July 31, 1905. He says, after stating that "Sakay frequents Northern Rizal"—"excluding Sakay's band, there are only 15 outlaws with 13 guns at large in this district" (Do., part 3, p. 133).

Barcelon, on whose behalf this proceeding was brought, was a tenant of the Hacienda of one Pedro Roxas, against whom a prosecution was instituted, apparently on the charge of having given money to one Julian Ramos, a *ladron*. Barcelon was arrested, brought to Batangas, and examined as a witness in the preliminary investigation of the charge against Roxas in the Court of First Instance of the Province. On April 19, 1905, after the conclusion of his examination, he was ordered by the Court into the custody of the sheriff. On April 22, 1905, the preliminary investigation was concluded, and he was ordered by the court "*released and liberated of all restraint*" (Rec., p. 1). Thereupon he was further detained by the defendant in error, Capt. Thompson, acting under the orders of the other defendant in error, Col. Baker, and is still in such custody *although not charged with any offense whatever*. It is to be observed that at his examination in the Court of First Instance, Barcelon testified that a former statement of his (Rec., pp. 13–15) made out of court between his arrest and his examination, was false, and that he made it because compelled thereto by abuse and violence (Rec., p. 6). The defendants in error claim that he has since made a further statement, retracting his testimony in court and confirming his original declaration (Rec., pp. 10, 14–21) but this last statement was, like the first, made out of court and without counsel. It does not

appear that Barcelon is or has been at any time charged with any crime or offense, and his original arrest and detention were evidently solely to secure his attendance as a witness.

Specification of Errors.

The following errors in the determination of the Court below will be presented for consideration by this court.

I. The court erred in refusing to try as a question of fact the existence of a state of insurrection in the province of Batangas (2d Assignment of Error, Rec., p. 46).

II. The Court erred in holding that the Philippine Civil Governor and Commission have sole and absolute power to determine when the privilege of the writ of *habeas corpus* may be suspended (3d Assignment of Error, p. 46).

III. The court erred in holding that the action of the Civil Governor and Philippine Commission in suspending the privilege of the writ of *habeas corpus* in Batangas was not subject to review in the event that insurrection, rebellion or invasion did not as a fact exist in said Province (4th Assignment of Error, Rec., pp. 46, 47).

IV. The court erred in denying petitioner's application and refusing to issue the writ (1st Assignment of Error, Rec., p. 46).

Brief of the Argument.

The argument to be made on behalf of the plaintiffs in error is briefly as follows :

I. The procedure herein was regular and the whole case is properly before this Court for determination.

II. Under the Philippine Civil Government Act the power of the Civil Governor and Philippine Commission to suspend the privilege of the writ of habeas corpus is not absolute and discretionary, but is limited to cases in which

some one of the required conditions precedent—"rebellion, insurrection or invasion"—actually exists.

III. The existence of a state of "rebellion, insurrection or invasion" is a question of fact to be judicially determined by the Court.

IV. As a matter of fact and as appears from the Record herein and from public documents, there was no state of "rebellion, insurrection or invasion" in the Province of Batangas at the time of the application and decision below.

V. The detention of the prisoner is a deprivation of liberty without due process of law.

VI. Under the Constitution, the power to suspend the privilege of the writ of *habeas corpus* rests in Congress, and cannot be delegated to the Philippine Civil Governor and Commission.

POINTS.

I.

The procedure herein was regular and the whole case is properly before this Court for determination.

By the Philippine Code of Procedure (Act No. 190, Acts of Phil. Comm.) the petition for a writ of *habeas corpus* may be made either by the prisoner "or by some person for him" (Code, Sect. 527). The authority of the petitioners herein sufficiently appears from their Reply (Rec., p. 22), and although it was questioned by the respondents below, it was recognized by the Court and is not in issue here.

All the facts necessary for a determination of the cause appear by the answering affidavits as fully as they would upon a

return to an actually issued writ. In such a case the proceeding can be determined as well upon the return of an order to show cause why the writ should not issue, as it could upon a return to the writ itself. Such procedure is customary, and has been expressly approved by this court.

See *Ex parte* Yarbrough, 110 U. S., 651, at 653.
Ex parte Milligan, 4 Wall., 2, at 110.

The absolute refusal of the writ is a final judgment, since it completely terminates the proceeding. The cause involves a statute of the United States (the Philippine Bill of Rights, contained in Sect. 5 of the Civil Government Act) and also the United States Constitution, and the jurisdiction of this court is thus placed beyond question under Section 10 of the same Act. Sufficient facts appear in the Record to authorize this court to pass upon the merits of the case, and order the prisoner's discharge, or, in any event, to direct the Court below to issue the writ and determine the case on its merits there.

II.

Under the Philippine Civil Government Act the power of the Civil Governor and Philippine Commission to suspend the privilege of the writ of habeas corpus is not absolute and discretionary, but is limited to cases in which some one of the required conditions precedent—"rebellion, insurrection or invasion"—actually exists.

Many of the constitutional guarantees of life, liberty and property have been expressly re-enacted by Congress in respect to the Philippines in Section 5 of the Civil Government Act, which is in effect a Philippine Bill of Rights. One of these provisions relates to *habeas corpus*, and reads as follows :

"That the privilege of the writ of *habeas corpus* shall not be suspended, unless where in cases of rebellion, in-

surrection or invasion the public safety may require it, in either of which events the same may be suspended by the President or by the governor with the approval of the Philippine Commission, wherever during such period the necessity for such suspension shall exist" (32 U. S. Stat., p. 692).

This is simply a re-enactment of the corresponding provision in the United States Constitution with certain additional limitations. The provision in the Constitution reads as follows: "The Privilege of the Writ of *Habeas Corpus* shall not be suspended unless where in cases of Rebellion or Invasion the public Safety may require it" (U. S. Const., Art. I., Sec. 9). As will be seen at a glance, the Philippine Act merely adds "insurrection" as a further ground of suspension, and then declares affirmatively by whom the suspension may be made, and that it may be made effective wherever necessary during the continuance of the conditions. It should be observed that "*whenever*" in the quotation from the Act in the opinion of the Court below (Rec., p. 25) is an error.

Since this is a re-enactment of a constitutional provision, its meaning and effect must be determined by the construction already placed upon such provision. A brief historical sketch of the constitutional provision thus becomes pertinent. It is contained in the body of the instrument and not in the amendments, and it was accordingly the subject of debate at the Constitutional Convention. As first proposed by Mr. Pinkney on August 20th, 1787, the provision read as follows:

> "The privileges and benefit of the Writ of *Habeas Corpus* shall be enjoyed in this Government in the most expeditious and ample manner, and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding months."
>
> Doc. Hist. U. S. Const. Vol. III., p. 565.

On August 28, 1787 the following debate took place:

> "Mr. Pinkney, urging the propriety of securing the benefit of the *habeas corpus* in the most ample manner ("for that purpose" stricken out) moved "that it should not be suspended but on the most urgent occasions, and then only for a limited time not exceeding twelve months."

"Mr. Rutledge was for declaring the *Habeas Corpus* inviolable. He did not conceive that a suspension could be necessary at the same time through all the States.

"Mr. Govr. Morris moved ("to add" stricken out) that "the privilege of the writ of *Habeas Corpus* shall not be suspended, unless where in cases of Rebellion or invasion the public safety may require it."

"Mr. Wilson doubted whether in any case a suspension could be necessary, as the discretion now exists with judges, in most important cases to keep in Gaol or admit to Bail.

"The first part of Mr. Govr. Morris' motion to the word "unless" was agreed to *nem. con.* On the remaining part;

"N. H. Ay. Mass. Ay, Ct. Ay, Pa. Ay, Del. Ay, Md. Ay, Va. Ay, N. C. No., S. C. No, Ga. No."

do. pp. 628-629.

The only change made by the Committee of revision was to substitute "when" for "where" after "unless,"

do. p. 726.

How this provision was regarded by the founders of the Republic strikingly appears by a letter from Thomas Jefferson to James Madison, dated in Paris, July 31, 1788, while the Constitution was being acted upon by the States. An extract therefrom will be found in the appendix to this brief (App. 2, p. 21). Jefferson vigorously controverts the necessity of ever suspending the privileges of the writ, and it appears from his letter and from the debate above quoted that the object of the provision was to prevent suspension at mere discretion, whether of the executive or the legislature, and avert the abuses of which the mother country had afforded so shameful an example.

A consideration of the history of the suspensions of the privilege of the writ in England, by a Parliament unfettered by constitutional restrictions, shows how well founded was Jefferson's contemporary criticism, and demonstrates that a discretionary power of suspension is not a safeguard of the State, but an engine of tyranny and oppression (See May's Constitutional History of England, Vol 2, pp. 252-259) App V p. 24

Moreover, the English Suspension Acts applied only to persons charged with high treason or treasonable practices (See Dicey's Law of the Constitution, p. 225).

The privilege of the writ has never been suspended by the Federal Government in this country except during the Civil War. The power of the President to effect the suspension being open to question, and having been denied in the Merryman Case (17 Fed. Cas., No. 9487), Congress passed the Act of March 3d, 1863 (12 U. S. Stat., p. 755), providing "That, *during the present rebellion*, the President of the United States, whenever in his judgment the public safety may require it, is authorized to suspend the privilege of the writ of *habeas corpus* in any case throughout the United States, or any part thereof."

This Act, however, carefully protected the liberties of the individual, for it went on to provide for the certification to the United States Courts, at regular intervals, of the names of all prisoners (not prisoners of war) held under Executive order, and their discharge if not indicted for some definite offense by the next Grand Jury. Moreover, the Act limited this power of suspension to the period of the Rebellion, and as soon as that was over it expired by its own limitation.

When Civil Government was established in the Philippines, this constitutional guarantee of personal liberty was expressly bestowed upon the inhabitants, and the power to suspend it was delegated by Congress to the President of the United States, or the Governor of the Philippines with the approval of the Commission. But this power is no more absolute and discretionary in the Philippines than it is in the United States. It is only granted in cases of rebellion or invasion, as in the United States, and in the further case of insurrection—a lesser grade of rebellion. "During such period" of rebellion, insurrection or invasion the suspension may be made "wherever" (viz., in whatever part or parts of the Islands) the necessity therefor shall exist. In other words, during the continuance of the rebellion, insurrection or invasion, the President or the Governor is to judge whether the necessity for a suspension exists, and to what Provinces it should apply, but unless the condition exists, the power does not come into being. It is like an estate limited upon a condition precedent. Otherwise the limiting words in the statute are mere verbiage. By whom the existence of the condition is to be determined will be considered under the next point.

III.

The existence of a state of "rebellion, insurrection or invasion" is a question of fact, to be judicially determined by the Courts.

This proposition is the *crux* of the case. If it is true, there must be a reversal, since the Court below expressly held that it had no power to enquire into this question, and that the proclamation of the Civil Governor was conclusive. If it is not true, then, under the Civil Government Act, the prisoner can have no relief by *habeas corpus*, so long as it pleases the authorities to keep up the fiction of an insurrection, and to detain him in custody.

Our contention is this: The suspension of the privilege of the writ of *habeas corpus* is an exercise of martial law. Martial law cannot be declared or enforced in a time when or place where peace prevails. The principal test of peace or war is whether or not the courts are open and performing their functions unhindered. This is the doctrine of the Milligan Case, 4 Wall., 2.

In considering whether the military commission by which Milligan was tried had any jurisdiction or power in the premises, the Court held "Martial rule can never exist where the Courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war" (*id.*, p. 127). The Court took judicial notice "that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances" (*id.*, p. 121), and judicially determined as a fact that war did not exist in Indiana so as to justify government by martial rule. Such rule, the Court held, can only be administered when the courts are "actually closed" and "on the theatre of active military operations, where war really prevails", and if such government is continued "after the courts are reinstated" or away from the locality of actual war, it is "a gross usurpation of power", and "mere lawless violence." This case is not merely good law but sound political science. Even the dissenting opinion only went to the extent of asserting a power in Congress, in case of civil or foreign war, to de-

clare martial law and authorize military trials in districts not included in the theatre of actual hostilities.

The best English opinion is to the same effect.

See Extracts from Dicey and Pollock, Appendix 4, p. 23 of this Brief.

In the case at bar the courts were open, and the prisoner himself had been called as a witness in an ordinary criminal prosecution, then pending.

This court has never held that during a suspension of the privilege of the writ of *habeas corpus*, the court to which an application for such writ may be made is without power to inquire into the facts upon which the right to suspend is conditioned, or that a declaration that such facts exist contained in a proclamation ordering the suspension is conclusive and irrebuttable at any time thereafter. Such a doctrine would lead directly to despotism, and would make it possible for an unscrupulous government completely to set at naught the constitutional guarantee against deprivation of liberty except by due process of law. If the proclamation is conclusive and the court can look no further into the facts, then the facts become immaterial, the power of suspension becomes absolutely discretionary, and the conditions imposed upon its exercise become mere idle words, to be disregarded by any administration willing to proclaim that an insurrection exists.

The Idaho case (*In re* Boyle, 45 L. R. A., 832) cited in the opinion below (Rec., pp. 33, 34) is, in the first place, obviously not controlling here, and, in the second place, not at all in point. The Idaho statute there considered expressly empowered the Governor, when "satisfied" that ordinary legal process was unenforceable, to proclaim a given locality in "a state of insurrection," and thus to put such locality under martial rule (See Statute in Appendix 3 to this brief, p. 22). No such power is conferred by the Philippine Civil Government Act, either expressly or by any necessary implication.

The Court below cites a large number of authorities in support of the doctrine "that whenever the Constitution or a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, such person is to be considered the sole and exclusive judge of the existence of those facts." Since the proposition, as so stated,

is not open to serious question, it would be a waste of time to review in detail the authorities cited in support thereof. Our contention is, however, that the Statute in question does not confer a discretionary power of suspension to be exercised by the Civil Governor (with the approval of the Commission) "upon his own opinion" of the existence of a state of rebellion, insurrection or invasion, but only upon his own opinion of the *necessity* for such suspension, *provided the required jurisdictional facts actually exist.*

Moreover, the cases cited relate to some executive act to be performed by an officer in the regular administration of his office. The following may be mentioned as examples:

The calling out of the militia in case of invasion, &c.

Martin vs. Mott, 12 Wheat., 19.
Vanderheyden vs. Young, 11 Johnson, 150.

The exclusion of an alien by the immigration authorities.

Nishimura Ekiu vs. U. S., 142 U. S., 651.
Lem Moon Sing vs. U. S., 158 U. S., 538.

The dispensing with advertising for a government contract in an emergency requiring immediate delivery.

U. S. vs. Speed, 8 Wall., 77.

The convening of a general court-martial with more than one-half of its members junior to the officer to be tried, where the exigencies of the service so require.

Mullan vs. U. S., 140 U. S., 240.
Swaim vs. U. S., 165 U. S., 553.

The granting of a reissued patent.

Allen vs. Blunt, 3 Story, 742; 1 Fed. Cas., No. 216.

The sale on short notice of perishable property in the custody of a collector.

Gould vs. Hammond, 1 McAll., 235; 10 Fed. Cas., No. 5638.

The detention of an enlisted marine whose term of service expires while on a cruise.

Wilkes vs. Densman, 7 Howard, 89.

There is a clear distinction between such cases, where an executive officer is acting within his usual sphere, and the case of a suspension of the privilege of the writ of *habeas corpus*, the one instance in which the executive or legislative department is allowed to step out of its sphere, and interfere with the usual processes of the judicial department. Doubtless the three departments are co-ordinate, and each in its own sphere of equal power and authority, but under our system of government it is within the sphere of judicial power to sit in review on the validity, though not on the wisdom, of legislative and executive acts. If a legislative act is unconstitutional, the courts can so determine and thus nullify it. If an executive act is contrary to statute or constitution, the courts can so determine and thus make it of no effect. Since this is so in regard to acts within the apparent sphere of legislature or executive, much more must it be so in a case where legislature or executive seeks to deprive the courts of the one legal process by which alone they can adequately protect individual liberty. Granted that in certain cases legislature or executive may have such power ; granted that where the power in fact exists, the wisdom or propriety of its exercise cannot be judicially reviewed ; nevertheless it surely must be within the jurisdiction of the Court whose hands are thus sought to be tied to enquire judicially into the existence of the facts on which the power to tie them is conditioned.

The case of Luther vs. Borden, 7 How., 1, on which the court below laid much stress, merely determines that where a *State* has declared martial rule within its borders, it is not for the Federal Government to interfere.

The court below also appears to have considered that simply as evidence the resolution of the Philippine Commission and the proclamation of the Governor were conclusive and irrebuttable. Various authorities are cited to support the proposition that " the state of war or peace is not a question *in pais* for courts to determine," but " a legal fact, ascertainable only from the decision of the political department " (Rec., p. 36). An examination of the authorities show that this only applies to *foreign* war or its equivalent. It is true that the decision of legislature and executive is conclusive upon

the courts upon questions of war or belligerency with a *foreign* power, or between *foreign* powers.

Rose vs. Himely, 4 Cranch., 241.
The Santissima Trinidad, 7 Wheat., 283.
The Nuestra Senora, 4 Wheat., 497.

So of the recognition of new governments.

U. S. vs. Palmer, 3 Wheat., 610.
Gelston vs. Hoyt, 3 Wheat., 246.
The Divina Pastora, 4 Wheat., 52.

So of boundary questions with foreign nations.

Foster vs. Neilson, 2 Pet., 253.

So in fact of all matters involving the foreign relations of the Government, which are expressly devolved upon the legislature and executive.

This is not the rule in cases of domestic war or insurrection (Fourteen Diamond Rings vs. United States, 183 U. S., 176; Lincoln vs. United States, 197 U. S., 419).

The rules as to foreign war were to a considerable degree extended to cover questions arising out of the great Civil War, but it was because the Civil War was of such magnitude as to be equivalent to a foreign war. In the very case in which this court first sanctioned this doctrine (Prize Cases, 67 U. S. 635) the court laid down the rule that the true test of the existence of a civil war is this: "When the regular course of justice is interrupted by revolt, rebellion, or insurrection *so that the courts of justice cannot be kept open, civil war exists*," precisely the same test as that laid down in the Milligan case *(supra)* for the justification of martial rule.

Cases are also cited by the court below relating to the manner in which the date of the termination of the Civil War was determined by the courts by reference to the President's proclamation. One of these very cases, however (U. S. vs. 1500 Bales of Cotton, 27 Fed. Cas. No. 15958) expressly recognized the possibility of other proof of a cessation of hostilities, and disclaimed any intention of holding "that legislation or proclamations are indispensable to terminate the legal condition of public political hostility." When the same question was before this court, its language on the subject was very guarded. In U. S. vs. Anderson 9 Wall., 56,

this court, after referring to the President's proclamation of August 20, 1866, declaring the restoration of peace, and to an Act of Congress of March 2d, 1867, adopting that date in fixing the pay of the army, said, by Mr. Justice DAVIS (at p. 71) "As Congress, in its legislation for the army, has determined that the rebellion closed on the 20th day of August, 1866, there is no reason why its declaration on this subject should not be received as settling the question wherever private rights are affected by it. That day will, therefore, be accepted as the day when the rebellion was suppressed, as respects the rights intended to be secured by the Captured and Abandoned Property Act." There is no decision in this court that an executive or legislative declaration that rebellion or insurrection exists is conclusive and irrebuttable evidence of the fact itself, and of its continuance until a contrary declaration from the same source. It is doubtless *admissible* evidence, but that does not make it uncontrovertible.

In other words, legislature and executive can neither make a state of insurrection exist, nor conclusively prove its existence, by a mere *ipse dixit*.

IV.

As a matter of fact and as appears from the record herein and from public documents, there was no state of "rebellion, insurrection or invasion" in the Province of Batangas at the time of the application and decision herein.

As there is no claim that either "rebellion" or "invasion" existed, it is sufficient to consider the question of "insurrection." The word is defined in the Century Dictionary as follows: "The act of rising against civil authority or governmental restraint; specifically the armed resistance of a number of persons to the power of the State; incipient or limited rebellion. * * * An *insurrection* goes beyond *sedition* in that it is an actual rising against the government, in discontent,

in resistance to a law, or the like. * * * *Rebellion* goes beyond *insurrection* in aim, being an attempt actually to overthrow the government, while an *insurrection* seeks only some change of minor importance."

It appears from the very Resolution and Proclamation on which the suspension was founded that the disorders in Cavite and Batangas were not in the nature of an uprising to overthrow or change the government, but were merely depredations by bands of robbers for the purpose of plunder. The very definition of *ladron* is "thief, robber, highwayman, cutpurse" (Velasquez, Span.-Eng. Dict.). The robber bands were stated to be "in open insurrection against the constituted authorities" (Rec., p. 11), but so is every highwayman. Such facts are not enough to constitute an "insurrection" worthy to be ranked with rebellion and invasion as a cause for suspending the privilege of the writ of *habeas corpus*. As appears from the definition of the word, insurrection must have a political aspect. Mere criminality and disorder do not make an insurrection.

This is expressly recognized in the Report of the Philippine Secretary of Commerce and Police. He says (Phil. Com. Rep., 1905, Part 3, p. 8): "It is characteristic of criminals never to own themselves to be outlaws, living by what they could plunder. * * * Leading Filipinos in Manila and in the provinces affected, the provincial governors and men who were distinguished in the insurrection against the United States Government during the years from 1899 to 1902, declared that there was no real political significance attached to these ladrones; that the men in charge were neither men of weight nor standing in the Filipino community, and that the purpose of this movement was purely personal aggrandizement and loot and their methods were intimidation and theft."

However serious the disorder may have been at the time of the Proclamation, it clearly appears from the official documents cited in the Statement of Facts that prior to the application and decision herein, Batangas was free from ladronism, and that in the whole Provisional District under Col. Baker's command (aside from Sakay's band in Northern Rizal), there were only 15 outlaws with 13 guns at large. Can such a mere handful of criminals, such a Falstaff's army of "rogues in buckram" constitute an insurrection, and justify

the suspension of the privilege of the writ of *habeas corpus?* These are public facts; this court will take judicial notice of them; the Court below should have done so; and yet it held itself concluded by the mere inadequate recitals of a Resolution and Proclamation, then more than six months old. The courts were open, the captured *ladrones* were being prosecuted by the ordinary criminal procedure, the present prisoner had given testimony in such a prosecution, and had been ordered discharged by the court in which it was pending. The "insurrection" was at that time an official fiction of the most transparent type, and the court below should have inquired into the facts and so found.

The allegation in the petition that insurrection did not then exist in Batangas (Rec., p. 2) was not even denied by the answer.

V.

The detention of the prisoner is a deprivation of liberty without due process of law.

The Civil Government Act expressly extends and makes applicable to the Philippines the constitutional guarantee against the deprivation of life, liberty or property without due process of law (Sec. 5). Even without such express extension, this fundamental constitutional limitation would clearly apply and control in all territory under the dominion of the United States. *There is no suggestion in the record that Barcelon is charged with any offense whatever*, or even that his further attendance as a witness will be required. He is not held under any legal process, but by mere *force majeure*, and he was expressly ordered to be discharged from custody by the Court of First Instance in which he testified. He is thus admittedly deprived of his liberty, not merely without *due* process of law, but without even any semblance or color of *any* process of law whatsoever. Unless the hands of all the courts are absolutely tied by the Resolution and Proclamation of the Commission and

Governor, he should receive at the hands of this Court the discharge from custody to which he is so manifestly entitled.

The suggestion that he is a voluntary guest of Capt. Thompson's does not require serious discussion. If such is the fact, his discharge from custody need not disturb the relation of host and guest. A guest may stay even when he is free to leave. This aspect of the case strongly suggests the polite formula of the *lettres de cachet*, by which the kings of France filled the Bastille. These instruments were in the form of a private letter from his Most Christian Majesty to the Governor of one of his royal castles to receive such an one into such castle and keep him there until further order (La Grande Encyclopedie, Vol. 5, p. 613, Funck Brentano, Archives de la Bastille, *passim*). That on the face of the matter the unhappy prisoner was deemed a royal guest did not go very far to alleviate his imprisonment. It is for this Court now to determine whether the civil government supposed to have been bestowed upon the Philippines means civil liberty or Bourbon despotism.

Another phase of the matter is also to be considered. It appears that prior to his testimony in court, Barcelon, while in custody of the constabulary, made a declaration adverse to the defendant in the then pending investigation. In court he denied this former declaration, and swore that it was extorted by violence ("Holy Virgin, how they beat me", Rec., p. 6). After his examination in court, while illegally held in custody, he reverted to his first declaration. It is to be noted that he was then out of the protection of the court, and surrounded by hostile officials. It is quite immaterial which of his conflicting declarations was true, but the fact that it would be possible, by detaining a witness in custody from which no *habeas corpus* could relieve him, to bring pressure to bear on him and make him retract testimony given under the protection of the Court, is a conclusive argument against a *discretionary* power in any one to suspend the privilege of the writ.

VI.

Under the Constitution, the power to suspend the privilege of the writ of habeas corpus rests in Congress, and cannot be delegated to the Philippine Civil Governor and Commission.

The argument thus far has proceeded upon the theory that under the proper construction of the statute itself, the Court below was empowered to enquire and decide whether an insurrection in fact existed. We now desire to call to the attention of this Court the further and broader argument that the power of Congress under the Constitution to delegate to any subordinate executive or legislative authority a general power to suspend the privilege of the writ of *habeas corpus* is more than doubtful.

It is to be remembered that the Constitutional provision in regard to *habeas corpus* is contained in the Article setting forth the powers of Congress, and that no right to delegate the power is granted either expressly or by implication.

We do not intend to reopen discussion of any matters covered and foreclosed by the decisions in the various Insular cases. That the Constitutional clauses as to uniformity of duties and as to indictments and trials by juries are not applicable to legislation for the unincorporated insular possessions has now been declared to be the law of the land. It has been held, however, that certain portions of the Constitution may be applicable to such legislation, and it is well recognized that where the Constitution does apply it is supreme and controlling (Rasmussen vs. U. S., 197 U. S., 516). The question still remains open as to what these *applicable* Constitutional limitations may be. As stated by Mr. Justice DAY in the case of Dorr vs. United States, 195 U. S., 138, p. 149:

> "We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in Article IV., § 3, to whatever other limitations it may be subject, *the extent of which must be decided as questions arise*, does not require that body to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the

> Constitution does not, without legislation and of its own force, carry such right to territory so situated."

None of the Insular Cases have decided whether or not the *habeas corpus* clause of the Constitution applies to these new possessions. We respectfully submit that it does apply since the "privilege of *habeas corpus*," while doubtless procedural in form, is really a substantive right of the most important and sacred character—the right to a judicial enquiry into the cause of any individual's detention.

As the Courts of the Philippine Islands at the time of the passage of this Statute (July, 1902) were authorized to issue writs of *habeas corpus* (*In re* Calloway, 1 Philippine Reports, 11), we contend that Congress could not suspend such privilege save in the way and to the extent provided for in the Constitution. While it is not necessary to moot the question, much discussed in some of the Civil War cases, whether Congress or the President has power to suspend the privilege of the writ, it is clear that, under the Constitution, neither Congress nor the President, acting jointly or severally, can delegate that power to any subordinate executive officer or legislative body.

Upon this theory, the attempted delegation to the Philippine Civil Governor and Commission was wholly void, and the attempted suspension relied on below was a mere nullity.

CONCLUSION.

Both under the Philippine Civil Government Act and under the Constitution, the judgment should be reversed and the cause remanded, with instructions to the Court below to discharge the prisoner, or at least to issue the writ and hear the cause on the merits.

Dated October 1st, 1906.

Respectfully submitted,

FREDERIC R. COUDERT,
HOWARD THAYER KINGSBURY,
Counsel for Plaintiffs-in-error,
71 Broadway,
N. Y.

Appendix 1.

LIPA, BATANGAS, April 30, 1905.

GOVERNOR AGUILERA,
Batangas.

I much regret that neither my work nor health will permit me to be present at your meeting of presidentes. Please, congratulate them for me on the freedom of Batangas from ladronism. While the constabulary and scouts have done hard and brilliant work, this striking result would not have been accomplished in less than four months had it not been for the patriotic intelligence and steady assistance of most of the principales, Batangas province, who realize that their country would most prosper and the ideal of their people be the best realized through the enforcement by the people themselves of peace and good order. In the final struggle with outlawry on which we are now entering I have full confidence that Batangas will destroy or capture any Cavite or Laguna ladrone who may be driven or seek refuge within her borders.

BAKER,
Assistant Chief, Commanding.

(Rep. Phil. Com. 1905, Part 1, p. *173*).

Appendix 2.

EXTRACT FROM LETTER OF THOMAS JEFFERSON TO JAMES MADISON.

PARIS, July 31st, 1786.

* * * "why suspend the Hab. Corp. in insurrections and rebellions? the parties who may be arrested may be charged instantly with a well defined crime. of course the Judge will remand them. if the publick safety requires that the government should have a man imprisoned on less probable testimony in these than in other emergencies; let him be

taken and tried, retaken and retried, while the necessity continues, only giving him redress against the government for damages. Examine the history of England; see how few of the cases of the suspension of the Habeas Corpus laws have been worthy of that suspension. they have been either real treasons wherein the parties might as well have been charged at once, or sham plots where it was shameful they should ever have been suspected. yet for the few cases wherein the suspension of the hab. corp. has done real good, that operation is now become habitual, and the minds of the nation almost prepared to live under its constant suspension."

Doc. Hist. of the Const, Vol. IV. pp. 824-5.

Appendix 3.

EXTRACTS FROM IDAHO STATUTES.

Constitution.

Art. I. Sec. 5. The privilege of the writ of *habeas corpus* shall not be suspended unless, in case of rebellion or invasion, the public safety requires it, and then only in such manner as shall be prescribed by law.

Art. IV, Sec. 4. The governor shall be commander-in-chief of the military forces of the State, except when they shall be called into actual service of the United States. He shall have power to call out the militia to execute the laws, to suppress insurrection or to repel invasion.

Penal Code.

Sect. 5164. When the governor is satisfied that the execution of civil or criminal process has been forcibly resisted in any county by bodies of men, or that combinations to resist the execution of process by force exist in any county, and that the power of the county has exerted, and has not been sufficient to enable the officer, having the process, to execute, he may, on the application of the officer, or of the district attorney or probate

judge of the county, by proclamation to be published in such papers as he shall direct, declare the county to be in a state of insurrection, and may order into the service of the State, such number and description of volunteer or uniform companies, or other militia of the State, as he shall deem necessary, to serve for such time, and under the command of such officer or officers as he shall direct.

1887 R. S., Sec. 7406, 1864, 1st Sess., p. 240, Sec. 96.

SECT. 5166. The governor may, when he thinks proper, revoke the proclamation authorized by the last section, or declare that it shall cease at the time and in the manner directed by him.

Appendix 4.

EXTRACTS FROM ENGLISH AUTHORITIES.

DICEY, THE LAW OF THE CONSTITUTION, 6TH ED.

P. 509. "From the nature of martial law follow four conclusions :

"*First, martial law cannot exist in time of peace.*

This is on all hands admitted.

What, then, is the test for determining whether a state of peace exists at a given time, in a given part of England, say London ?

The answer is that no unfailing test can be found ; the existence of a state of peace is a *question of fact to be determined in any case before the courts in the same way as any other such question.*"

"WHAT IS MARTIAL LAW" by Sir Frederick Pollock, Law Quarterly Review, Vol. 18 (1902) 152.

P. 156. "The justification of any particular act done in a state of war is ultimately examinable in the ordinary courts, *and the prior question whether there was a state of war at a given time and place is a question of fact.*"

Appendix V.

The practical teachings of history generally and especially that of England in the 18th century are of more value in the interpretation of our federal constitution than any amount of mere theoretical reasoning or speculative political philosophy The Constitution is in major part an outgrowth of English legal development and cannot be read intelligibly save in the light of English history.

This is especially true of all matters therein contained relating to the great fundamental "liberties of the subject." It was to guard against the abuses that had occurred in England and to crystallize into permanent, immutable form rights which had been there so recently and so hardly won, that not only the Bill of Rights but the *Habeas Corpus* clause were placed in the Constitution.

The object of this appendix is to give in concise and authoritative form a history of the suspension acts in England with a view to showing the abuse that arose from the unlimited power of Parliament in this respect.

It is evident that this danger must have been in the minds of the framers of the Constitution and led to the limitation upon the power to suspend the writ.

It is obvious, however, that a self limitation is no limitation and that if the body suspending the writ can itself determine the conditions upon which its jurisdiction depend, the limitation becomes merely blank paper. The framers evidently meant that these limitations should be practical limitations and that a suspension could not take place until certain jurisdictional facts existed. The existence of these facts, if the check were to be effective, must necessarily be determinable as are other justiciable facts.

The following quotation seems to us to throw clear light upon the evils which the framers of the Constitution desired to guard against as well as to indicate the soundness of the view propounded by this Court in the great Milligan case to the effect that martial law should not prevail where the courts are open and in ordinary operation.

Mr. May, the highest authority on the Modern Constitutional History of England, gives the following statement in

regard to the Suspension Acts which statement we herewith quote in full.

May's Constitutional History of England, Vol. II., pp. 252-259.

"The writ of *Habeas Corpus* is unquestionably the first security of civil liberty. It brings to light the cause of every imprisonment, approves its lawfulness or liberates the prisoner. It exacts obedience from the highest courts. Parliament itself submits to its authority. No right is more justly valued. It protects the subject from unfounded suspicions, from the aggressions of power and from abuses in the administration of justice. Yet this protective law, which gives every man security and confidence in times of tranquility, has been suspended again and again in periods of public danger or apprehension. Rarely, however, has this been suffered without jealousy, hesitation and remonstrance; and whenever the perils of the state have been held sufficient to warrant this sacrifice of personal liberty, no minister or magistrate has been suffered to tamper with the law at his discretion. Parliament alone, convinced of the exigency of each occasion, has suspended for a time the rights of individuals in the interests of the state.

The first years after the Revolution were full of danger. A dethroned king, aided by foreign enemies and a powerful body of English adherents, was threatening the new settlement of the crown with war and treason. Hence the liberties of Englishmen, so recently assured, were several times made to yield to the exigencies of the state. Again, on occasions of no less peril—the rebellion of 1715, the Jacobite conspiracy of 1722 and the invasion of the realm by the Pretender in 1745—the *Habeas Corpus* Act was suspended. Henceforth, for nearly half a century, the law remained inviolate. During the American war, indeed, it had been necessary to empower the king to secure persons suspected of high treason, committed in North America or on the high seas, or of the crime of piracy; but it was not until 1794 that the civil liberties of Englishmen, at home, were again to be suspended. The dangers and alarms of that dark period have already been recounted. Ministers, believing the state to be threatened by traitorous conspiracies, once more sought power to countermine treason by powers beyond the law.

Relying upon the report of a secret committee, Mr. Pitt moved for a bill to empower His Majesty to secure and detain persons suspected of conspiring against his person and government. He justified this measure on the ground, that whatever the temporary danger of placing such power in the hands of the government, it was far less than the danger with which the

constitution and society were threatened. If ministers abused the power intrusted to them, they would be responsible for its abuse. It was vigorously opposed by Mr. Fox, Mr. Grey, Mr. Sheridan, and a small body of adherents. They denied the disaffection imputed to the people, ridiculed the revelations of the committee, and declared that no such dangers threatened the state, as would justify the surrender of the chief safe guard of personal freedom. This measure would give ministers absolute power over every individual in the kingdom. It would empower them to arrest, on suspicion, any man whose opinions were obnoxious to them,—the advocates of reform, even the members of the parliamentary opposition. Who would be safe, when conspiracies were everywhere suspected, and constitutional objects and language believed to be the mere cloak of sedition? Let every man charged with treason be brought to justice: in the words of Sheridan, "where there was guilt, let the broad axe fall;" but why surrender the liberties of the innocent?

Yet thirty-nine members only could be found to oppose the introduction of the bill. Ministers, representing its immediate urgency, endeavored to pass it at once through all its stages. The opposition, unable to resist its progress by numbers, endeavored to arrest its passing for a time, in order to appeal to the judgment of the country; but all their efforts were vain. With free institutions, the people were now governed according to the principles of despotism. The will of their rulers was supreme, and not to be questioned. After eleven divisions, the bill was pressed forward as far as the report, on the same night; and the galleries being closed, the arguments urged against it were merely addressed to a determined and taciturn majority. On the following day, the bill was read a third time and sent up to the Lords, by whom, after some sharp debates, it was speedily passed.

The strongest opponents of the measure, while denying its present necessity, admitted that when danger is imminent, the liberty of the subject must be sacrificed to the paramount interests of the state. Ringleaders must be seized, outrages anticipated, plots disconcerted, and the dark haunts of conspiracy filled with distrust and terror. And terrible indeed was the power now intrusted to the executive. Though termed a suspension of the *Habeas Corpus* Act, it was, in truth, a suspension of Magna Charta,[2] and of the cardinal principles of the common law. Every man had hitherto been free from imprisonment until charged with crime by information upon oath; and entitled to a speedy trial, and

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[2] "*Nullus liber homo capiatur aut imprisonetur, nisi per legale judicium parium suorum.*" * * * "*Nulli negabamus, nulli differemus justiciam.*"

the judgment of his peers. But any subject could now be arrested on suspicion of treasonable practices, without specific charge or proof of guilt; his accusers were unknown; and in vain might he demand public accusation and trial. Spies and treacherous accomplices, however circumstantial in their narratives to secretaries of state and law officers, shrank from the witness-box; and their victims rotted in jail. Whatever the judgment, temper and good faith of the executive, such a power was arbitrary, and could scarcely fail to be abused.[3] Whatever the dangers by which it was justified—never did the subject so much need the protection of the laws as when government and society were filled with suspicion and alarm.

Notwithstanding the failure of the state prosecutions, and the discredit cast upon the evidence of a traitorous conspiracy on which the Suspension Act had been expressly founded, ministers declined to surrender the invidious power with which they had been intrusted. Strenuous resistance was offered by the opposition to the continuance of the act; but it was renewed again and again, so long as the public apprehensions continued. From 1798 to 1800, the increased malignity and violence of English democrats, and their complicity with Irish treason, repelled further objections to this exceptional law.[1]

At length, at the end of 1801, the act, being no longer defensible on grounds of public danger, was suffered to expire, after a continuous operation of eight years. But before its operation had ceased, a bill was introduced to indemnify all persons who since the 1st of February, 1793, had acted in the apprehension of persons suspected of high treason. A measure designed to protect the ministers and their agents from responsibility, on account of acts extending over a period of eight years, was not suffered to pass without strenuous opposition. When extraordinary powers had first been sought, it was said that ministers would be responsible for their proper exercise; and now every act of authority, every neglect or abuse, was to be buried in oblivion. It was stated in debate that some persons had suffered imprisonment for three years, and one for six, without being brought to trial; and Lord THURLOW could "not resist the impulse to deem men innocent until tried and convicted." The measure was defended, however, on the ground that persons accused of abuses would be

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[3] Blackstone says: "It has happened in England during temporary suspensions of the statute, that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten." *Comm.* iii. (Kerr) 146.

[1] In 1798 there were only seven votes against its renewal. In 1800 it was opposed by twelve in the Commons, and by three in the Lords. It was then stated that twenty-nine persons had been imprisoned, some for more than two years, without being brought to trial.—Parl. Hist., xxxiv. 1484.

unable to defend themselves, without disclosing secrets dangerous to the lives of individuals and to the state. Unless the bill were passed, those channels of information would be stopped, on which government relied for guarding the public peace. When all the accustomed forms of law had been departed from, the justification of the executive would indeed have been difficult; but evil times had passed, and a veil was drawn over them. If dangerous powers had been misused, they were covered by an amnesty. It were better to withhold such powers than to scrutinize their exercise too curiously; and were any further argument needed against the suspension of the law, it would be found in the reasons urged for indemnity.

For several years, the ordinary law of arrest was free from further invasion. But on the first appearance of popular discontents and combinations, the government resorted to the same ready expedient for strengthening the hands of the executive, at the expense of public liberty. The suspension of the *Habeas Corpus* Act formed part of Lord SIDMOUTH'S repressive measures in 1817, when it was far less defensible than in 1794. At the first period, the French Revolution was still raging; its consequences no man could foresee; and a deadly war had broken out with the revolutionary government of France. Here, at least, there may have been grounds for extraordinary precautions. But in 1817, France was again settled under the Bourbons; the revolution had worn itself out; Europe was again at peace; and the state was threatened with no danger but domestic discontent and turbulence.

Again did ministers, having received powers to apprehend and detain in custody persons suspected of treasonable practices, and, having imprisoned many men without bringing them to trial, seek indemnity for all concerned in the exercise of these powers, and in the suppression of tumultuous assemblies. Magistrates had seized papers and arms, and interfered with meetings, under circumstances not warranted even by the exceptional powers intrusted to them: but having acted in good faith for the repression of tumults and sedition, they claimed protection. This bill was not passed without strenuous resistance. The executive had not been idle in the exercise of its extraordinary powers. Ninety-six persons had been arrested on suspicion. Of these, forty-four were taken by warrant of the secretary of state; four by warrant of the privy council; the remainder on the warrants of magistrates. Not one of those arrested on the warrant of the secretary of state, had been brought to trial. The four arrested on the warrant of the privy council, were tried and acquitted. Prisoners had been moved from prison to prison in chains; and after a long, painful, and even solitary imprisonment, discharged on their recognizances, without trial.

Numerous petitions were presented, complaining of cruelties and hardships ; and though falsehood and exaggeration characterized many of their statements, the justice of inquiry was insisted on, before a general indemnity was agreed to. "They were called upon," said Mr. Lambton, "to throw an impenetrable veil over all the acts of tyranny and oppression that had been committed under the Suspension Act. They were required to stifle the voice of just complaint—to disregard the numerous petitions that had been presented, arraigning the conduct of ministers, detailing acts of cruelty unparalleled in the annals of the Bastile, and demanding full and open investigation." But on behalf of government, it appeared that in no instance had warrants of detention been issued, except on information upon oath ; and the attorney-general declared that none of the prisoners had been deprived of liberty for a single hour, on the evidence of informers alone, which was never acted on, unless corroborated by other undoubted testimony.

Indemnity was granted for the past ; but the discussions which it provoked, disclosed, more forcibly than ever, the hazard of permitting the even course of the law to be interrupted. They were not without their warning. Even Lord SIDMOUTH was afterwards satisfied with the rigorous provisions of the Six Acts ; and, while stifling public discussion, did not venture to propose another forfeiture of personal liberty. And happily, since his time, ministers, animated by a higher spirit of statesmanship, have known how to maintain the authority of the law, in England, without the aid of abnormal powers.

In Ireland, a less settled state of society—agrarian outrages—feuds envenomed by many deeds of blood—and dangerous conspiracies, have too often called for sacrifices of liberty. Before the Union, a bloody rebellion demanded this security ; and since that period, the *Habeas Corpus* Act has been suspended on no less than six occasions. The last Suspension Act, in 1848, was rendered necessary by an imminent rebellion, openly organized and threatened ; when the people were arming, and their leaders inciting them to massacre and plunder. Other measures in restraint of crime and outrage have also pressed upon the constitutional liberties of the Irish people. But let us hope that the rapid advancement of that country in wealth and industry, in enlightenment and social improvement, may henceforth entitle its spirited and generous people to the enjoyment of the same confidence as their English neighbors."

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

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OCT 19 1906
JAMES H. McKENNE
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FRED C. FISHER and CHARLES C. COHN, on behalf of Felix Barcelon,
Plaintiffs in Error,

against

COLONEL DAVID J. BAKER and CAPTAIN JOHN DOE THOMPSON,
Defendants in Error.

No. 214.

SUPPLEMENT TO BRIEF FOR PLAINTIFFS IN ERROR.

FREDERIC R. COUDERT,
HOWARD THAYER KINGSBURY,
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In the Supreme Court of the United States.

OCTOBER TERM, 1906.

FRED C. FISHER and CHARLES C. COHN, on behalf of Felix Barcelon, Plaintiffs in Error, AGAINST COLONEL DAVID J. BAKER and CAPTAIN JOHN DOE THOMPSON, Defendants in Error.	No. 214.

SUPPLEMENT TO BRIEF FOR PLAINTIFFS IN ERROR.

In response to certain questions asked by the learned Justices upon the argument, we desire to supplement our brief as follows:

I.

The Philippine Statute as to Ladronism.

This statute was referred to in the brief of the Solicitor General.

As first enacted (Act No. 518 of Nov. 12, 1902) it reads as follows:

"AN ACT DEFINING HIGHWAY ROBBERY OR BRIGANDAGE, AND PROVIDING FOR THE PUNISHMENT THEREFOR.

"*By authority of the United States, be it enacted by the Philippine Commission, that:*

"SECTION 1. Whenever three or more persons, conspiring together, shall form a band of robbers for the

" purpose of stealing carabao or other personal property
" by means of force and violence, and shall go out upon
" the highway or roam over the country armed with
" deadly weapons for this purpose, they shall be deemed
" highway robbers or brigands, and every person en-
" gaged in the original formation of the band, or joining
" it thereafter, shall, upon conviction thereof, be pun-
" ished by death or imprisonment for not less than
" twenty years, in the discretion of the court.

" SEC. 2. To prove the crime described in the pre-
" vious section, it shall not be necessary to adduce evi-
" dence that any member of the band has in fact com-
" mitted robbery or theft, but it shall be sufficient to
" justify conviction thereunder if, from the circum-
" stances, it can be inferred beyond reasonable doubt
" that the accused was a member of such an armed
" band as that described in said section.

" SEC. 3. Persons guilty of the crime defined in sec-
" tion one may be punished therefor in the Court of
" First Instance in any province in which they may be
" taken or from which they may have fled.

" SEC. 4. Every person knowingly aiding or abetting
" such a band of brigands as that described in section
" one by giving them information of the movement of the
" police or constabulary, or by securing stolen property
" from them, or by procuring supplies of food, clothing,
" arms, or ammunition and furnishing the same to
" them shall, upon conviction be punished by imprison-
" ment for not less than ten years and not more than
" twenty years.

" SEC. 5. The public good requiring the speedy
" enactment of this bill, the passage of the same is
" hereby expedited in accordance with section two of
" ' An Act prescribing the order of procedure by the
" ' Commission in the enactment of laws,' passed Sep-
" tember twenty-sixth, nineteen hundred.

" SEC. 6. This Act shall take effect on its passage."

(Vol. 9 Public Laws and Resolutions of the Philippine Commission, pp. 235–6.)

Certain amendments were made by Act No. 1121 of April 27, 1904, the full text of which is as follows:

" AN ACT AMENDING ACTS NUMBERED FIVE HUNDRED AND EIGHTEEN AND SEVEN HUNDRED AND EIGHTY-ONE SO AS MORE FULLY TO DEFINE THE CRIME OF BRIGANDAGE, AND PROVIDING PUNISHMENT FOR THE FAILURE OF

MUNICIPAL OFFICIALS TO PERFORM THEIR DUTY IN THAT RESPECT.

" *By authority of the United States, be it enacted by the Philippine Commission, that:*

" SECTION 1. Section one of Act Numbered Five " hundred and eighteen, entitled an 'An Act defining " ' highway robbery or brigandage and providing for " ' the punishment therefor,' is hereby amended so as " to read as follows:

" ' SECTION 1. Whenever three or more persons, con- " ' spiring together, shall form a band of robbers for " ' the purpose of stealing carabaos, cattle, horses, rice, " ' or personal property of any description, or for the " ' purpose of abducting persons, either for the " ' purpose of extortion or obtaining ransom, or for " ' any other purpose, by means of force and violence, " ' and shall be armed with deadly weapons for this " ' purpose, they shall be deemed highway robbers, or " ' brigands, and every person engaged in the original " ' formation of the band, or joining it thereafter, shall, " ' upon conviction thereof, be punished by death or " ' imprisonment for not less than twenty years, in the " ' discretion of the court.'

" SEC. 2. Section two of said Act Numbered Five " hundred and eighteen is hereby amended so as to " read as follows:

" ' SEC. 2. To prove the crime described in the pre- " ' vious section, it shall not be necessary to adduce " ' evidence that any member of the band has in fact " ' committed robbery or theft or abduction, but it shall " ' be sufficient to justify conviction thereunder if, from " ' all the evidence, it can be inferred beyond a reason- " ' able doubt that the accused was a member of such " ' an armed band as that described in said section one.'

" SEC. 3. Section four of said Act Numbered Five hun- " dred and eighteen is hereby amended so as to read as " follows:

" ' SEC. 4. Every person knowingly aiding or abet- " ' ting such a band of brigands as that described in " ' section one by giving them information of the move- " ' ment of the police or Constabulary or other peace " ' officers of the Government, or of the forces of the " ' United States Army when acting in aid of the Gov- " ' ernment, or by securing or receiving stolen property " ' from such brigands, or by procuring for them sup- " ' plies of money, food, clothing, arms, ammunition, or

" ' other property of any kind, or by furnishing the
" ' same to them, or by knowingly hiding, lodging, or
" ' harboring in his house or assisting in any way in the
" ' escape of a member of such a band of robbers as de-
" ' fined in section one, shall, upon conviction, be pun-
" ' ished by imprisonment for not less than ten years
" ' and not more than twenty years.'

" SEC. 4. Section five of Act Numbered Seven hun-
" dred and eighty-one, entitled ' An Act amending Act
" ' Numbered One hundred and seventy-five, entitled
" ' " An Act providing for the organization of an Insu-
" ' " lar Constabulary and for the inspection of the
" ' " the municipal police," and Acts Numbered Six
" ' hundred and ten, Six hundred and eighteen and Six
" ' hundred and nineteen amendatory thereof,' is hereby
" amended by adding at the end thereof the following
" words : ' Municipal policemen shall be deemed to be
" ' municipal officers for the purpose of this section.'

" SEC. 5. The public good requiring the speedy en-
" actment of this bill, the passage of the same is hereby
" expedited in accordance with section two of ' An Act
" ' prescribing the order of procedure by the Commis-
" ' sion in the enactment of laws,' passed September
" twenty-sixth, nineteen hundred.

" SEC. 6. This Act shall take effect on its passage."
(Vol. 15, *id.*, p. 99.)

This statutory definition of ladronism or brigandage fully supports our position that ladronism has no political aspect. It is criminal disorder, not insurrection or rebellion ; it threatens individuals, not the governmental framework.

II.

Distinction Between Rebellion and Insurrection.

We beg to quote the definitions of "rebellion" and "insurrection" given in Lieber's Code or "Instructions for the Government of Armies of the United States in the Field," which constitutes the military law of the United States (See Birkheimer, Military Government & Martial Law, p. 485) :

" 1. Insurrection is the rising of people in arms
" against their Government or a portion of it, or against

"one or more of its laws, or against an officer or officers "of the Government. It may be confined to mere "armed resistance, or it may have greater ends in "view." * * *

"3. The term rebellion is applied to an insurrection of large extent, and is usually a war between "the legitimate Government of a country and portions "of provinces of the same who seek to throw off their "allegiance to it and set up a Government of their "own."

These definitions bring out a clear distinction between the two terms, and show that "insurrection" means merely armed resistance to certain features of a government, while "rebellion" is an attempt to overthrow the Government altogether.

If, as we contend, the *habeas corpus* clause of the constitution is applicable to the Philippines as a fundamental limitation upon the powers of Congress, then the inclusion in the Philippine Civil Government Act, of "insurrection" as a ground of suspension of the privilege of the writ, is unconstitutional, and the privilege of the writ may not be suspended in the Philippines except in cases of "rebellion" and "invasion."

It does not appear to be claimed in the case at bar that either "rebellion" or "invasion" existed in the Philippine Islands at the time of the decision below, and the very statute under which Roxas was prosecuted negatives any inference even of insurrection.

III.

Governmental Recognition of Condition of Peace.

It is evident that neither the Government of the United States nor the Government of the Philippine Islands believed that a condition of insurrection existed in Batangas or Cavite during the time of the suspension of the writ. This is made

evident from the following action on the part of the Government.

> " Section 7 of the act of Congress providing for the " taking of the census declares :
>
> " That two years after the completion and publication " of the census, in case of such condition of general and " complete peace with recognition of the authority of the " United States shall have continued in the territory of " said islands not inhabited by Moros or other non- " Christian tribes, and such facts shall have been certi- " fied to the President by the Philippine Commission, the " President upon being satisfied thereof shall direct said " Commission to call, and the Commission shall call, a " general election for the choice of delegates to a popu- " lar assembly of the people of said territory in the " Philippine Islands, which shall be known as the Phil- " ippine assembly. After said assembly shall have con- " vened and organized all legislative power heretofore " conferred on the Philippine Commission in all that " part of said Islands not inhabited by Moros or other " non-Christian tribes shall be vested in a legislature " consisting of two houses, the Philippine assembly.
>
> " The President having been advised by the Secre- " tary of War of the completion and publication of the " census, cabled to the Governor-General of the Philip- " pines that upon March 27, 1907, if the conditions " should be as indicated in the foregoing law, he will " direct the Commission to call a general election. This " information was published in Manila by the Gov- " ernor-General's proclamation of March 28, 1905."
>
> (Report of the Phil. Com., Part 1, 1905, p. 26).

It will be noted that the calling by the Commission of a general election depends upon a *continued* " general and complete peace with recognition of the authority of the United States " for a period of two years " after the completion and publication of the census." Manifestly the publication of the census indicated the existence of peace at the time of publication, since it was the publication which was to set the two year *peace time* running. It is, therefore, interesting to find the following proclamation of the Governor on the 28th day of March, 1905 :

"BY THE GOVERNOR-GENERAL OF THE PHILIPPINE ISLANDS.
"A PROCLAMATION.

"Whereas the Secretary of War has informed this "Government that on the twenty-seventh day of March, "nineteen hundred and five, the Philippine Census "Bureau, with the aid of the United States Census "Bureau, completed and published the fourth and last "volume of the report of the Philippine census taken "in accordance with the provisions of section six of the "Act of Congress approved July first, nineteen hun-"dred and two:

"Now, therefore, I, LUKE E. WRIGHT, Governor-"General of the Philippine Islands, do hereby proclaim "the publication of the Philippine census as above set "forth, and do call the attention of the people of these "Islands to that part of section seven of the said Act of "Congress approved July first, nineteen hundred and "two, which provides that two years after the completion "and publication of the census, in case a condition of "general and complete peace with recognition of the "authority of the United States shall have continued in "the territory of these Islands not inhabited by Moros "or other non-Christian tribes and such facts shall "have been certified to the President by the Philippine "Commission, the President upon being satisfied "thereof shall direct the Philippine Commission to call, "and the Commission shall call, a general election "for the choice of delegates to a popular assembly of "the people of said territory in the Philippine Islands, "which shall be known as the Philippine Assembly, and "which provides also that after the said Assembly shall "have convened and organized, all the legislative power "heretofore conferred on the Philippine Commission in "all that part of these Islands not inhabited by Moros "or other non-Christian tribes shall be vested in a Leg-"islature consisting of two Houses—the Philippine "Commission and the Philippine Assembly.

"In witness whereof I have hereunto set my hand "and caused the seal of the Government of the Philip-"pine Islands to be affixed.

"Done at the City of Manila this twenty-eighth day "of March nineteen hundred and five.

"LUKE E. WRIGHT.

"By the Governor-General:

"A. W. FERGUSSON,
"Executive Secretary."

(Rep. of the Phil. Com., Part I, 1905, pp. 801, 802).

Neither the Secretary of War nor the Governor-General of the Philippine Islands could have issued such a proclamation during the existence of insurrection, the very issuance of such proclamation being predicated upon the existence of a state of peace which, should it continue for a period of two years, would lead to the general elections provided for by the statute.

IV.

Additional historical instance of suspension.

In our brief, we stated (at page 9): "The privilege of the writ has never been suspended by the Federal Government in this country except during the Civil War." A similar statement is found in the Solicitor General's brief at page 35. Another instance of such suspension has just come to our notice, and we deem it our duty to call it to the attention of the Court in correction of such statement in our brief.

We refer to the Act of April 20th, 1871 (17 U. S. Statutes, p. 13), characterized by Professor Burgess as "the noted, not to say notorious, Ku Klux Act" (see "Reconstruction and the Constitution," pp. 257-261).

This Act, after defining certain unlawful combinations "to overthrow, or to put down or to destroy by force the government of the United States," or to prevent the execution of the laws of the United States, etc., provided as follows:

> "SEC. 4. That whenever in any State or part of a "State the unlawful combinations named in the preced- "ing section of this act shall be organized and armed, "and so numerous and powerful as to be able, by vio- "lence, to either overthrow or set at defiance the con- "stituted authorities of such State, and of the United "States within such State, or when the constituted "authorities are in complicity with, or shall connive at "the unlawful purposes of, such powerful and armed

" combinations; and whenever, by reason of either or
" all of the causes aforesaid, the conviction of such
" offenders and the preservation of the public safety
" shall become in such district impracticable, in every
" such case such combinations shall be deemed a rebel-
" lion against the government of the United States, and
" during the continuance of such rebellion, and within
" the limits of the district which shall be so under the
" sway thereof, such limits to be prescribed by procla-
" mation, it shall be lawful for the President of the
" United States, when in his judgment the public safety
" shall require it, to suspend the privileges of the writ
" of *habeas corpus*, to the end that such rebellion may
" be overthrown: *Provided*, That all the provisions of
" the second section of an act entitled 'An act relating
" 'to *habeas corpus*, and regulating judicial proceedings
" 'in certain cases,' approved March third, eighteen
" hundred and sixty-three, which relate to the discharge
" of prisoners other than prisoners of war, and to the
" penalty for refusing to obey the order of the court,
" shall be in full force so far as the same are applicable
" to the provisions of this section: *Provided further*,
" That the President shall first have made proclamation,
" as now provided by law, commanding such insurgents
" to disperse: *And provided also*, That the provisions
" of this section shall not be in force after the end of
" the next regular session of Congress."

It would appear that under this statute the privilege of the writ was in fact suspended for a short time in certain counties in South Carolina (Burgess, *supra*, pp. 260, 261). We are unable to find any reported decisions affecting the construction or constitutionality of this act save U. S. vs. Harris, 106 U. S., 629, holding invalid a combination clause in the Revised Statutes taken from this law. It is to be noted, however, that it reapplied the provisions of the Act of March 3, 1863 (12 U. S. Stat., 755), in regard to the discharge of prisoners not indicted by the next Grand Jury, and that it expired by its own terms by the end of the next regular session of Congress.

So far as this Act of 1871 has any bearing on the questions at bar, we regard it as supporting our contention that the privilege of the writ of *habeas corpus* cannot be suspended except by specific authorization of Congress during rebellion or invasion, and that under the Constitution Congress can

make no general delegation of the power of suspension. It is also in accord with our views that "rebellion" must, *ex vi termini*, have a political purpose, and is not constituted by mere common-law crime.

October 16, 1906.

Respectfully submitted,

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No. 214.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

FRED C. FISHER AND CHARLES C. COHN, ON BEHALF OF FELIX BARCELON, PLAINTIFFS IN ERROR,

v.

COLONEL DAVID J. BAKER, JR., AND CAPTAIN JOHN DOE THOMPSON.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE UNITED STATES.

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BRIEF FOR THE UNITED STATES.

STATEMENT.

The question here is whether under the act of Congress of July 1, 1902, section 5 (32 Stat., 691, 692), the governor-general of the Philippine Islands has the right to suspend the writ of habeas corpus free from judicial inquiry as to the occasion and necessity for such action. The court are not interested to consider or determine any doubtful question of fact. Nevertheless, it is desirable to show from the contents of the record just what the situation is from which the legal inquiry arises.

1. It seems that the real petitioner, Barcelon, repudiates his lawyers, the plaintiffs in error, and

disclaims the action which they have assumed to initiate in his behalf. It seems that they are not really his lawyers, but are rather the counsel of a certain Don Pedro Roxas, out of whose prosecution by the Government the present proceedings grow. The petitioner, Barcelon, was a witness for the prosecution in that case.

The answer of the respondents states (Rec., p. 10), without contradiction, that Fisher and Cohn are attorneys for Roxas, and in the prosecution of Roxas, Fisher conducted the examination for the defense at the preliminary investigation (p. 5). The answer asserts that this application was made without the knowledge, consent, or approval of Barcelon and against his wishes, and submits telegrams from the governor of the province of Batangas, from Captain Thompson, and from a notary, showing that Barcelon had so stated to them and made affidavit accordingly before the notary (pp. 9, 10, 12, 13). It is true that the plaintiffs in error subsequently filed in the case a copy of an authorization from Barcelon of later date than the telegrams (p. 22).

2. Barcelon appears to be merely under the surveillance and care of Captain Thompson. He does not consider himself under detention. He is satisfied to remain in Thompson's house, where he is a gratuitous lodger and not a prisoner. This is necessary for his protection from threats, intimidations, and possible assassination. (Answer and accompanying documents, *ut sup.*) But *per*

contra the authorization referred to approves of all the acts of Fisher and Cohn "to obtain my true liberty from this imprisonment in which I find myself" (p. 22).

3. Roxas is a wealthy landowner, Barcelon a tenant farmer on his estate. Roxas, with his manager, his son, Barcelon, and others, in April, 1905, made a tour of inspection of his estates in the province of Batangas. When they came near a certain place or district in the mountains called Alasas, the son of Roxas (according to the original story of the witness), gave Barcelon 20 pesos and sent him with three others of the party to give the money to Ramos, a bandit of that region, who seems to have been levying and receiving contributions, and Barcelon delivered this money to Ramos, and his three companions witnessed the transaction. Barcelon's statement or declaration to this effect was made on April 15, 1905, in the presence of Mr. Harvey, assistant attorney-general of the Philippines, and other officers or employees of the Government (pp. 7, 13, 20). It seems that Roxas was thereupon prosecuted under an act of the Philippine government (act of April 27, 1904, No. 1121, sec. 3, amending sec. 4 of an act defining the crime of brigandage, etc.; 3 Laws Phil. Com., 318), which provides:

> Every person knowingly aiding or abetting such a band of brigands as that described in section one by * * * procuring for them supplies of money, food,

> clothing, * * * or by furnishing the same to them, * * * shall, upon conviction, be punished by imprisonment for not less than ten years and not more than twenty years.

I assume or suggest that this was the law under which Roxas was charged. The record is silent on that point. At all events, at the preliminary investigation of the case against Roxas (whatever the charge was) in the Court of First Instance in the province of Batangas (p. 3 *et seq.*) Barcelon, being a witness for the prosecution and under direct examination, denied that he knew Ramos or had seen him, described the trip of inspection over the estate without giving the incident of the delivery of the pesos, and denied that they had visited Alasas on that day. And then he testified on cross-examination that his original declaration (p. 13) had been extorted from him by beating and cruel treatment at the hands of an officer of the government or constabulary (who chanced to have the same name as the bandit) in the hold of the steamer which brought him to Batangas from the place of his original detention as a witness. Upon questioning by the judge of first instance, Barcelon confirmed his entire statement just then made and specifically reiterated the declaration that he had not seen "Julian Ramos, the so-called leader of brigands," and that Roxas did not give him the sum of 20 pesos. Subsequently—that is, on May 8, 1905—in the "Investigation of Witnesses in the

Roxas Case" (p. 14 *et seq.*) Barcelon returned to his original declaration and gave the same story in greater detail, and declared that—

> The reason why I told the story in the court in Batangas is that there was some person who came to me when I was in the *cuartel* at Batangas and told me to tell the court that the statement that I had made in Lipa was false. I do not know who the person was, as it was at night. * * * He told me to tell the court that that statement that I made in Lipa was a lie, and to tell them that I had been beaten by Lieutenant Ramos in order to make me make that statement. * * *
>
> Question. Were you afraid for any reason not to do what that man told you to do?
>
> Answer. Yes, sir; I was afraid of him because he told me he would kill me if I did not tell the judge what he said (pp. 15, 16).

On August 2, 1905, the plaintiffs in error filed their petition in the Supreme Court of the Philippine Islands for a writ of habeas corpus in behalf of Barcelon, alleging that Barcelon is restrained of his liberty by the Philippine constabulary without just grounds and simply in order to cause and persuade him to retract his statements before the Court of First Instance; that there is no rebellion, insurrection or invasion whatever in the province of Batangas; that the courts of law in that province are in the full and complete exercise of their

functions, wherefore the petitioners pray that the writ issue, etc. (pp. 1, 2).

That court issued a rule to show cause to which an answer was put in (pp. 9, 10); heard the application, and then denied it on the ground that under the act of Congress the action of the Philippine authorities in proclaiming the fact that an open insurrection existed in the provinces of Cavite and Batangas and suspending the writ of habeas corpus therein was final and conclusive and was not subject to judicial review. (Opinion, pp. 22–42; Willard, J., dissenting, pp. 42–44.) The case was then brought here by writ of error, the assignments being, in brief, that the Supreme Court of the islands erred in holding that by the act of Congress the governor and Commission are the sole and exclusive judges of when and where the privileges of the writ may be suspended, and in holding that the action of the Philippine authorities in suspending the writ in said provinces is not subject to judicial review, and in not holding that the suspension should be annulled in the event that insurrection, invasion or rebellion does not exist as a fact in said parts of the islands (pp. 46–47).

The action of the Philippine authorities was as follows: On January 31, 1905, the Philippine Commission adopted the subjoined resolution (Rec., pp. 10–11, 24):

> Whereas certain organized bands of ladrones exist in the provinces of Cavite and

Batangas who are levying forced contributions upon the people, who frequently require them, under compulsion, to join their band, and who kill or maim in the most barbarous manner those who fail to respond to their unlawful demands, and are therefore terrifying the law-abiding and inoffensive people of those provinces; and

Whereas these bands have in several instances attacked police and constabulary detachments and are in open insurrection against the constituted authorities; and

Whereas it is believed that these bands have numerous agents and confederates living within the municipalities of the said provinces; and

Whereas, because of the foregoing conditions, there exists a state of insecurity and terrorism among the people which makes it impossible in the ordinary way to conduct preliminary investigations before justices of the peace and other judicial officers:

Now, therefore, be it resolved, That, the public safety requiring it, the civil governor is hereby authorized and requested to suspend the writ of *habeas corpus* in the provinces of Cavite and Batangas.

On the same day the following proclamation was issued (pp. 11, 24–25):

Whereas certain organized bands of ladrones exist in the provinces of Cavite and Batangas, who are levying forced contributions upon the people, who frequently require them, under compulsion, to join their

bands, and who kill or maim in the most barbarous manner those who fail to respond to their unlawful demands, and are therefore terrorizing the law-abiding and inoffensive people of those provinces; and

Whereas these bands have in several instances attacked police and constabulary detachments, and are in open insurrection against the constituted authorities, and it is believed that the said bands have numerous agents and confederates living within the municipalities of the said provinces; and

Whereas, because of the foregoing conditions, there exists a state of insecurity and terrorism among the people, which makes it impossible in the ordinary way to conduct preliminary investigations before justices of the peace and other judicial officers:

In the interest of the public safety it is hereby ordered that the writ of *habeas corpus* is from this date suspended in the provinces of Cavite and Batangas.

LUKE E. WRIGHT,
Civil Governor.

Section 5 of the act of Congress of July 1, 1902, as cited above, provides that "the privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President or by the governor with the approval of the Philippine Commission, wherever during such period the necessity for such suspension shall exist."

ARGUMENT.

I.

AS TO JURISDICTION.

The court will notice of its own motion a defect of jurisdiction patent on the record. The petitioners have mistaken their remedy. They have come up on writ of error and should have come by appeal.

Section 10 of the Philippine act of July 1, 1902 (32 Stat., 691, 695), provides:

> That the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the supreme court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby in which the Constitution, or any statute, treaty, title, right, or privilege of the United States is involved, or in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; *and such final judgments or decrees may and can be reviewed, revised, reversed, modified, or affirmed by said Supreme Court of the United States on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and*

> *by the same procedure, as far as applicable, as the final judgments and decrees of the Circuit Courts of the United States.*

It is well settled that an order of a Circuit Court or District Court of the United States upon an application for a writ of habeas corpus can only be reviewed by appeal and not by writ of error.

In *In re Morrissey* (137 U. S., 157, 158), decided before the passage of the Circuit Court of Appeals act, the court said:

> This case, appealed from the Circuit Court for the Eastern District of Missouri, presents, like that of *Grimley, petitioner*, just decided, a question arising on *habeas corpus* as to the right of the petitioner, an enlisted soldier, to be discharged from military custody. An effort was made to bring this case here by writ of error; but that was abandoned and an appeal rightfully substituted. (*In re Neagle*, 135 U. S., 1, 42.)

In *Rice* v. *Ames* (180 U. S., 371, 373–374) the court said:

> Motion is made to dismiss the appeal upon the ground that there is no provision of law allowing an appeal in this class of cases. Prior to the Court of Appeals act of 1891 provision was made for an appeal to the Circuit Court in *habeas corpus* cases "from the final decision of any court, justice, or judge inferior to the Circuit Court" (Rev. Stat., sec. 763), and from the final decision of such Circuit Court an appeal might be taken

to this court. (Rev. Stat., sec. 764, as amended March 3, 1885, c. 353, 23 Stat., 437.)

The law remained in this condition until the Court of Appeals act of March, 1891, was past, the fifth section of which permits an appeal directly from the District Court to this court "in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question." In this connection the appellee insists that an appeal will not lie, but that a writ of error is the proper remedy. In support of this we are cited to the case of *Bucklin* v. *United States* (159 U. S., 680), in which the appellant was convicted of the crime of perjury, and sought a review of the judgment against him by an appeal, which we held must be dismissed, upon the ground that criminal cases were reviewable here only by writ of error. Obviously that case has no application to this, since under the prior sections of the Revised Statutes, above cited, which are taken from the act of 1842, an *appeal* was allowed in *habeas corpus* cases. The observation made in the *Bucklin* case that "there was no purpose by that act to abolish the general distinction, at common law, between an appeal and a writ of error," may be supplemented by saying that it was no purpose of the act of 1891 to change the forms of remedies theretofore pursued.

(*In re Lennon*, 150 U. S., 393; *Ekiu* v. *United States*, 142 U. S., 651; *Gonzales* v. *Cunningham*, 164 U. S., 612.)

It is well settled that habeas corpus is a civil and not a criminal proceeding, although instituted to arrest a criminal prosecution. (*Ex parte Tom Tong*, 108 U. S., 556, 559; *Farnsworth* v. *Montana*, 129 U. S., 104, 113; *Cross* v. *Burke*, 146 U. S., 82, 88.)

Since, then, the plaintiffs in error are not properly before the court, it seems clear that the writ of error must be dismissed for lack of jurisdiction.

II.

ON THE ESSENTIAL QUESTIONS.

The proclamation of Governor Wright sets forth the facts with particularity, and they are sufficiently impressive and convincing. This very case well illustrates the situation, and goes to prove the truth of the facts set forth in the proclamation. The record contains significant evidence of what was really going on in Batangas, despite the conflicting declarations of the witness, and even if a court can not regard the Government's view and theory as strictly proved. A landlord of large estates (it is charged) makes a contribution of money to the leader of one of these bands, doubtless under the same obvious compulsion which brought blackmail from the Lowlander to the Highland reiver, who otherwise carried off herds and crops. An igno-

rant and terrified witness receives some hint of vengeance, which leads him to change his story, and when he returns to his original tale his life is probably in danger.

If he is taken from his so-called detention, which is really his protection, the same insidious power may secretly abduct and punish him. I by no means intend to suggest that the habeas corpus proceeding is in itself a plot for this purpose, but it is curiously adapted and might be completely effective to that end. It is manifest that constabulary officers would have no motive to maintain the Government policy of breaking up ladrones and punishing those who aid them by suborning witnesses and treating them cruelly. A Government officer, military or civil, would be far less likely, it is certain, to pursue such a lawless and violent course than men under the ban of the law and bred in a vicious system would be to apply the covert threat of vengeance. So, on the inherent probabilities as to the truth, it seems clear that this case itself shows the necessity for Governor Wright's proclamation and action.

Opposing counsel cite official documents in support of the contention that some months after the proclamation was issued and after the events in this case occurred, but before the hearing on habeas corpus, the insurrection was checked. This amounts to the argument that as soon a Government officer reported to his superior that they were handling the matter satisfactorily and making

progress, the proclamation suspending the writ should have been revoked. It was revoked in the following October (see proclamation below); and if we are at all correct in our contentions the time to revoke suspension as well as to suspend is properly determined by the executive authority and neither by the statements of administrative reports nor legal argument based upon those statements. By their own showing counsel concede that for four months after the proclamation was issued sharp military work was needed, and then undertake to say, because they think so, that this week or this month, rather than the period deliberately fixt by the executive, marks the entire cessation of the insurrection. I may also note that Colonel Baker's letter (see Appendix, opposing brief), dated April 30, 1905, speaks of "the final struggle with outlawry on which we are *now* entering."

Who is to determine such facts in such emergencies? These grave occasions of state brook no delay. If the summary things which governments are occasionally called upon to do must be stayed until all the doubters and questioners (whether from motives sincere or not) are answered satisfactorily to themselves, there would be frequent anarchies everywhere. The judicial machinery is too tardy for the sudden demand, it is not fitted to sift and divide such emergencies sharply. The existence of the exigency as a fact is not within the established scope of judicial inquiry. It does not

act on such matters or respond to such calls. The executive intelligence and discretion, the conscience and good faith of the political departments, must be trusted.

And when two legislatures combine in a grant of power and in the initiation of the Executive act, and the designated Executive authority determines deliberately that the occasion and due moment have arrived, and thereupon proceeds to act, the fullest demands of cautious checks and proper safeguards have been met. It is hardly necessary to say that the possible abuse of the power is no objection to its existence and exercise. The presumption always is that such governmental acts are duly and rightly done. These are broad statements of the principle, and closer analysis must now be made. What is the intent of the law? If it means to commit the necessary determination of fact to the Executive alone, is it valid?

The provision of the Constitution as to habeas corpus is that—

> The privilege of the writ of habeas corpus shall not be suspended unless in cases of rebellion or invasion the public safety may require it. (Art. 1, sec. 9, cl. 2.)

The act of Congress recognizing for the Philippines this general restriction on the suspension of the writ grants the authority to suspend the privilege "when in cases of rebellion, insurrection, or invasion the public safety may require it." The authority is granted to the President, and to the

governor-general, with the approval of the Philippine Commission, "wherever during such period the necessity for such suspension shall exist." Congress was providing for the known conditions in the Philippines. Insurrections were notoriously frequent—that is, minor rebellions. Congress noticed the fact, and provided for it by adding the word "insurrection" to the phrase in the Constitution, and gave the power specifically, not leaving it to the doubtful question whether or not this provision of the Constitution applies to the Philippines.

It seems to me certain that by such a law Congress necessarily intends to commit to the President, and here to the governor of the Philippines as well, the determination of the exigency and the question whether the occasion exists. In the civil war instance the rebellion was raging and appears on the face of the act (*post*), and no one could doubt that the constitutional occasion existed. The President was only called upon to determine when and where the public safety required suspension. His right to determine that question under the authority of the act by his own judgment alone was sustained.

In the present Philippine case the danger did not exist at the moment, but was anticipated and provision made accordingly, the Executive function being extended beyond the determination of the period during which the public safety required suspension to embrace the fundamental exigencies

of rebellion, insurrection, or invasion. That is plainly what this act intends. Is it valid? It is, of course, if the exact limitation of the Constitution does not control, or if the act is consistent with that limitation.

THE PRECISE LIMITATION OF THE CONSTITUTION DOES NOT CONTROL.

The court itself has said that some limitations of the Constitution are applicable to the Philippines and our other insular territories, and some are not. To which class does this provision of the Constitution belong? I do not mean to argue again minutely this issue of the insular cases. But I shall endeavor to show from the principles suggested by members of the court why this provision of the Constitution *totidem verbis* should not be applied to the Philippines.

1. The rule of the Constitution is, it is true, a prohibition in one aspect, but it is a negative pregnant. It is also a grant or recognition of affirmative power in another aspect. Is it, as a prohibition, one of those which "go to the very root of the power of Congress to act at all, irrespective of time or place?" Is it like the flat prohibitions that "no bill of attainder or ex post facto law shall be past?" and "no title of nobility shall be granted by the United States?" There is no doubt that the prohibition against double jeopardy in the fifth article of the Constitution is a general and unlimited prohibition, and contains no exception

recognizing affirmative power. "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

That provision is just as essential and fundamental to personal liberty as the restriction on the suspension of the writ of habeas corpus; and yet in the *Kepner* case (195 U. S., 100, 117, *et seq.*) the court rests the validity of the guarantee against double jeopardy in the Philippine Islands, not on the Constitution but upon the instructions of President McKinley and the jeopardy clause of the same section of the act of 1902 now before the court, which incorporated, with other fundamental guarantees, as the so-called Philippine bill of rights, language equivalent to the constitutional provision on the subject—"And no person for the same offense shall be twice put in jeopardy of punishment." The court said:

> It is not necessary to determine in this case whether the jeopardy provision in the bill of rights would have become part of the law of the islands without Congressional legislation. The power of Congress to make rules and regulations for territory incorporated in or owned by the United States is settled by an unbroken line of decisions of this court and is no longer open to question [citing *American Insurance Co.* v. *Canter* and other authorities].

So that from the general discussion of that opinion, and from this passage as well, it is clear that the court prefer to rest that constitutional

provision as applicable to the Philippine Islands, not upon the Constitution itself, but upon the act of Congress.

Again, in the discussion of the opinion of the court in *Downes* v. *Bidwell* upon this point of the applicability of various provisions of the Constitution to Territories (182, U. S., 279), the court notes, citing the cases of certain Territories, that—

> In all these cases, as well as in Territories subsequently organized west of the Mississippi, Congress thought it necessary either to extend the Constitution and laws of the United States over them, or to declare that the inhabitants should be entitled to enjoy the right of trial by jury, of bail, and of the privilege of the writ of habeas corpus, as well as other privileges of the bill of rights.

It seems clear, then, that the court would in this case also rest the law regarding habeas corpus in the Philippines not upon the Constitution, but upon the act of Congress. And that view would not seem to be weakened because in the double jeopardy case the provisions of the Constitution and of the statute are substantially alike, while the habeas corpus provision of the act differs from the Constitution.

2. It is certain that Congress was not of opinion that the Constitution took effect in the Philippines of its own force; otherwise they would not have enacted this particular provision or any other of the Bill of Rights clauses of section 5 of this act.

This is also shown by the passage just cited from *Downes* v. *Bidwell*, and section 1891, Revised Statutes, manifests generally the same attitude of Congress.

3. I do not appeal to the argument *ab inconvenienti;* but since Congress has put in force in the Philippines the vital spirit and meaning of the constitutional provision on this subject, modifying it only so as to fit the local circumstances and to recognize the practical difficulties or impossibilties in the way of the determination of particular exigencies by Congress itself, because of the distance of the Philippines from the United States, is not that sufficient in the legal view as well as wise and necessary in the practical view? But we stand on the unequivocal determinations of this court respecting other fundamental guarantees not to be distinguished from this in regard to essentiality, that the act of Congress controls and constitutes the Philippine constitution; that Congress may make such rules and regulations for the government of the Territories. (*Kepner* case as cited; and see *Dorr* case, *ubi infra*.)

If, then, the exact provision of the Constitution is not in force in the Philippines *ex proprio vigore*, the act of Congress validly constitutes the law on the subject for those islands, and the only real question is as to the intent of Congress, to be construed in the light of established principles and past adjudications respecting executive determinations of fact under legislative authority. If,

with reference to this country, and the unquestioned application of the Constitution, there is some doubt, as exprest in the past, whether the President could judge even of the exigency whether the public safety now required the suspension of the writ, and very grave doubt whether Congress itself was not required to judge of the underlying exigencies, viz, rebellion or invasion, then as to the Philippines these doubts are resolved by the act of Congress, which is not limited by the Constitution, and of which the manifest intent is that all the necessary exigencies should be judged of by the President or the Philippine authorities.

IT IS WELL SETTLED THAT THE EXECUTIVE DETERMINATION IN KINDRED MATTERS IS BEYOND JUDICIAL REVIEW.

We come, then, to the claim that the Executive may not judge of the exigency finally and conclusively; that the courts may review the matter and decide whether the exigency in fact exists. This claim bears upon the power and intent of Congress, and prior adjudications have settled the principle.

The leading cases are *Martin* v. *Mott* (12 Wheat., 19) and *Luther* v. *Borden* (7 How., 1, 42, 45). In the former the statute provided that whenever the United States shall be invaded or be in danger of invasion it shall be lawful for the President to call forth such number of the militia of the States most convenient to the place of danger as he may judge

necessary to repel the invasion and to issue orders to the officers of the militia as he shall think proper. Speaking of the power, the court said (*per* Mr. Justice Story):

> The power thus confided by Congress to the President is doubtless of a very high and delicate nature. * * * It is in its terms a limited power, confined to cases of actual invasion or of imminent danger of invasion. If it be a limited power, the question arises, By whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question upon which every officer to whom the orders of the President are addrest may decide for himself and equally open to be decided by every militiaman who shall refuse to obey the orders of the President? 'We are all of opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President and that his decision is conclusive upon all other persons. * * * The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union (pp. 29–30).
>
> The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision and in effect defeat it. Whenever a statute gives a discretionary power to any person to be exercised by him upon his

> own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. And in the present case we are all of opinion that such is the true construction of the act of 1795. It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself (pp. 31–32).

This case itself shows and has always been regarded as deciding that such a determination of the Executive could not be *judicially* questioned. (Pomeroy's Constitutional Law, sec. 476; Tucker on the Constitution, p. 581.)

It is evident that in the opinion of this court such was the scope of the decision in *Martin* v. *Mott*. In *Luther* v. *Borden* the court said:

> After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right?
>
> If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy and not of order. Yet if this right does not reside in the courts when the conflict is raging, if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. It can not, when peace is restored,

punish as offenses and crimes the acts which it before recognized, and was bound to recognize, as lawful.

* * * * *

A question very similar to this arose in the case of *Martin* v. *Mott* (12 Wheat., 29–31). The first clause of the first section of the act of February 28, 1795, of which we have been speaking, authorizes the President to call out the militia to repel invasion. It is the second clause in the same section which authorizes the call to suppress an insurrection against a State government. The power given to the President in each case is the same, with this difference only, that it can not be exercised by him in the latter case except upon the application of the legislature or executive of the State. The case above mentioned arose out of a call made by the President by virtue of the power conferred by the first clause; and the court said that "whenever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts." The grounds upon which that opinion is maintained are set forth in the report, and we think are conclusive. The same principle applies to the case now before the court. Undoubtedly, if the President, in exercising this power, shall fall into error, or invade the rights of the people of the State, it would be in the power of Con-

> gress to apply the proper remedy. But the courts must administer the law as they find it (pp. 43–45).

I do not deem it necessary to cite other decisions in support of this principle. A long list of them is given in the opinion of the court below.

THERE IS NO ILLEGAL DELEGATION OF LEGISLATIVE POWER.

This notion is advanced in one of the cases cited below (*In re Oliver*, 17 Wis., 703), but was rejected by the court. It was urged that by the act of 1863, *post*, Congress, instead of suspending the writ only, attempted to confer upon the President the power to do so, which was claimed to be void as an attempt to delegate legislative power to the Executive.

The rule is well stated by Judge Ranney, speaking for the Supreme Court of Ohio, as follows:

> The true distinction is between the delegation of power to make the law which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done; to the latter no valid objection can be made. (*Railroad* v. *Commissioners*, 1 Ohio Stat., 88.)

The court quoted that statement with approval in *Field* v. *Clark* (143 U. S., 649, 693–694), as also the following passage from the opinion in *Locke's Appeal* (72 Pa. St., 491, 498):

> To assert that a law is less than a law because it is made to depend on a future event or act is to rob the legislature of the power to act wisely for the public welfare whenever a law is past relating to a state of affairs not yet developed, or to things future and impossible to fully know. * * * The legislature can not delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which can not be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation.

See also *Buttfield* v. *Stranahan* (192 U. S., 470, 496).

It was declared in *Slack* v. *Railroad* (13 B. Mon. 1, 23, 24) that:

> It is not essential to the character and force of a law that the legislative enactment should itself command to be done everything for which it provides. The legislative power to command a particular thing to be done includes the power to authorize it to be done. The act done under authority conferred by the legislature is precisely as legal and valid as if done in obedience to a legislative command. * * * So far as such a statute confers authority and discretion, it is as ob-

> ligatory from the first as the legislative power can make it; and although its further practical efficacy may depend upon the discretionary act of some other body or individual, it is not derived from that discretion, but from the will of the legislature which authorized the act and prescribed its consequences.

Again, in *Blanding* v. *Burr* (13 Cal., 343, 357) the court says:

> Laws may be absolute * * * or they may be subject to such conditions as the legislature may impose. * * * They are not the less perfect and complete when past by the legislature, tho future and contingent events may determine whether or not they shall ever take effect. In anticipation of invasion or insurrection or local disturbance, or other emergencies requiring the exercise of special powers, acts are constantly past, and yet no one has ever questioned their validity as laws because dependent in their operation upon occasions which may never arise.

In *Moers* v. *City of Reading* (21 Pa. St., 188, 202) it was held that:

> Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it can not be said that the exercise of such discretion is the making of the law.

In other words, the law has been in fact enacted. Its application or enforcement merely has been postponed until the happening of a certain contingent event which may be judged of validly by other than the legislative authority. Broadly, the matter falls under the discussion in Cooley on "Delegating legislative power," viz:

> A statute may be conditional and its taking effect may be made to depend upon some subsequent event;

and, quoting from an authority not clearly specified—

> When a law is made to take effect upon the happening of such an event, the legislature, in effect, declare the law inexpedient if the event should not happen. * * * They appeal to no other man or men to judge for them in relation to its present or future expediency; they exercise that power themselves, and then perform the duty which the Constitution imposes upon them. (Cooley, Const. Lim., 6th ed., pp. 137–138, 142.)

So, here, the law is made to depend on a future event; the power and discretion to judge of that event are committed to the Executive; there is no delegation of legislative power.

But if the notion of a delegation of legislative power could find lodgment here, then the reply is that the frame of government as it now exists in the Philippines has been before this court in vari-

ous cases, and no intimation has come from the court that Congress has exceeded the due bounds in empowering the Philippine government to legislate. By various statutes familiar to the court, Congress has taken over and adopted as its own, with more ample grants of power, the territorial executive government, which continued in the Philippines *ex necessitate* after the Spanish war.

The court has determined that the war power was *functus officio* after the war ended, notwithstanding the native insurrection against our authority; that the executive had no right under the war power to collect duties on imports from the United States after April 11, 1899; and that other sections of this act of July 1, 1902, did not ratify such collections. (*Lincoln* v. *United States*, 197 U. S., 419; same caption, 202 U. S., 484.) The court has settled the law as to double jeopardy in the Philippines. (*Kepner* v. *United States*, 195 U. S., 100; *Trono* v. *United States*, 199 U. S., 521.) But in no case has the court considered and determined adversely the grant of power by Congress to the Philippine authorities to legislate or condemned their exercise of that power. On the contrary, this court has approved the exercise of this legislative power in its broadest aspects by the Philippine Commission. (*Dorr* v. *United States*, 195 U. S., 138, 143, 149, 153.)

OTHER ADVERSE CONTENTIONS; REVIEW OF CIVIL WAR SITUATION; AND CONCLUSIONS.

It is suggested in the dissenting opinion that there is an essential difference between the power given by Congress to the President as Commander in Chief under the Constitution to call men into military service, and the power given by the Constitution to Congress to suspend the writ of habeas corpus so as to prevent one in custody from having his detention inquired into by the courts. *Ex parte Milligan* is cited as authority for the contention that the suspension of habeas corpus is subject to judicial review, and that the Executive does not possess the power to decide exclusively whether a state of insurrection exists or not.

Another view advanced is that prior to the passage of the act of July 1, 1902, the Philippine Commission possest the power absolutely to suspend the writ and even to repeal the law which authorized it to be issued, citing *In re Calloway* 1 Phil. Rep., 11; that the act of Congress was not a grant of power but a restriction, and to hold that the Commission still has the same power of suspension as before is to make the act of no effect and practically to repeal it.

As to the latter point it is sufficient to say that in the *Calloway* case (which would not be controlling authority here in any event), no question whatever is raised about the power of the Philippine Commission to suspend the writ of habeas

corpus at any time. That case simply decided that under General Orders, No. 58, as amended, the courts of the Philippine Islands have no authority to release persons imprisoned by military authority. The opinion also notes that under article 17 of the Philippine Commission's judiciary act of June 11, 1901 (No. 136, 1 Laws of Phil. Com., p. 252), the Supreme Court of the islands shall have original jurisdiction to issue habeas corpus and other writs in accordance with the code of civil procedure, but that the code was not yet in force at that time. There is not a word about the power to suspend the writ.

The introduction of the writ into the Philippines was as follows:

General Orders, No. 58, military governor of the Philippine Islands, dated April 23, 1900, provided (sec. 77):

> Every person unlawfully imprisoned or restrained of his liberty under any pretense whatever may prosecute a writ of habeas corpus, in order to inquire into the cause of such imprisonment or restraint.

Then followed the provision of the Philippine Commission's act just referred to; and the final step was the provision of section 5 of the act of July 1, 1902, now before the court.

So that it is a mistake to say that the Philippine Commission previously had absolute power to suspend, which the act of Congress restricted, thus conveying the impression that the act was a nega-

tive thing withdrawing power, whereas it is manifest that it grants the power but appends, substantially, the constitutional limitations.

A perfect illustration of this double aspect is given in the charge of the Lord Chief Justice of England in the case of Nelson and Brand (London, 1867, p. 80). There was a "Militia act" of Parliament recognizing martial law, and it provided in effect that martial law "shall not in future be declared or imposed but by the opinion or advice of a council of war consisting as aforesaid." Upon this Chief Justice Cockburn comments as follows:

> Now, it is true this is in one sense a restraining statute. It takes away from the governor the power to proclaim martial law except upon a given condition. It subjects his authority in that respect to the assent of a council of war to be summoned for the purpose. But then, upon the other hand, it plainly indicates that the exercise of martial law is considered as within the province of the governor, etc.

This statute in all respects presents a close analogy to our own, and shows clearly enough, as Lord Cockburn thought, what the intent of a legislature is in thus committing discretion to an executive, subject to the approval of his council.

In England the power to suspend the writ of habeas corpus belongs exclusively and without limitation to Parliament. (1 Bl. Com., p. *136; Chief Justice Taney in the *Merryman* case, citing the passage from Blackstone.)

> Hitherto no suspension of the writ has ever been authorized by Congress since the establishment of the Constitution. It would seem, as the power is given to Congress to suspend the writ of habeas corpus in cases of rebellion or invasion, that the right to judge whether exigency had arisen must exclusively belong to that body. (Commentaries on the Constitution, 5th ed., vol. 2, pp. 214–215, and notes.)

It appears from one of the notes to this passage that Mr. Jefferson was opposed to the power to suspend; that the only attempt to suspend the writ prior to the civil war was made during his administration as a result of his message to Congress on the Burr conspiracy. A bill to suspend passed the Senate, but was rejected in the House. Chief Justice Taney, in the *Merryman* case, comments as follows upon this matter:

> When the conspiracy of which Aaron Burr was the head became so formidable and was so extensively ramified as to justify, in Mr. Jefferson's opinion, the suspension of the writ, he claimed on his part no power to suspend it, but communicated his opinion to Congress with all the proofs in his possession, in order that Congress might exercise its discretion upon the subject and determine whether the public safety required it. And in the debate which took place upon the subject no one suggested that Mr. Jefferson might exercise the power himself if, in his opinion, the public safety demanded.

In the controversy over President Lincoln's famous order of April 27, 1861, authorizing General Scott to suspend habeas corpus within the military lines about Washington if he should meet with resistance, it was the opinion of Mr. Binney (Privilege of the Writ of Habeas Corpus; Philadelphia, 1862), and of other eminent lawyers and statesmen, that the President had the right not only to judge whether the exigency had arisen, but also to suspend the writ upon such determination and without an act of Congress authorizing him to do so. It was held otherwise, however, by Chief Justice Taney in *Merryman's* case (*Ex parte Merryman*, Taney, 1246), and the Chief Justice filed an opinion denying the authority of the President to suspend the writ in his own discretion, and stating his reasons for the view that the authority was vested in Congress. To the same effect is the decision in *Ex parte Benedict* (Fed. Cas., No. 1292).

Now, it must be conceded that the weight of judicial authority is that under the Constitution the power to suspend the writ or to authorize the suspension of the writ belongs to Congress and not to the President. The reasoning and conclusion of Chief Justice Taney, invoking the *semble* of Justice Story, *ante*, and the statement of Chief Justice Marshall in *Ex parte Bollman*, *post*, have prevailed, notwithstanding the sharp challenge which they met at the time and the weighty adverse opinions. But there is a great difference between an order of the Executive assuming to act alone, like President

Lincoln's order of 1861, and an order issued in pursuance of an act of Congress. Congress has exercised the power here, and there is no question before the court as to the existence of a broad and inherent power in the Executive alone. That claim was born of the sudden emergencies and the life and death struggle of a great war, and was probably settled forever by the judicial decisions, the subsequent legislative acts, and the Executive acquiescence and action thereunder.

The only other law which Congress has ever past authorizing the suspension of the writ is the act of March 3, 1863 (12 Stat., 755), which provided (sec. 1):

> That during the present rebellion the President of the United States, whenever in his judgment the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case thruout the United States or any part thereof. And whenever and wherever the said privilege shall be suspended, as aforesaid, no military or other officer shall be compelled, in answer to any writ of habeas corpus, to return the body of any person or persons detained by him by authority of the President; but upon the certificate, under oath, of the officer having charge of any one so detained that such person is detained by him as a prisoner under authority of the President, further proceedings under the writ of habeas corpus shall be suspended by the judge or court having issued the said

> writ so long as said suspension by the President shall remain in force and said rebellion continue.

In pursuance of this authority, President Lincoln issued his proclamation of September 15, 1863 (13 Stat., 734), declaring that "the public safety does require that the privilege of the said writ shall now be suspended thruout the United States in the cases where, by the authority of the President of the United States, military, naval, and civil officers of the United States, or any of them, hold persons under their command or in their custody either as prisoners of war, spies, or aiders or abettors of the enemy," etc.; and thereupon it was declared that the privilege of the writ was suspended, and that this suspension shall continue thruout the territory of the said rebellion or until this proclamation shall by a subsequent one to be issued by the President of the United States be modified or revoked. The act of 1863 contained numerous other provisions regulating personal rights and judicial proceedings in cases arising under the exercise of the power.

Considering now the cases arising under the act of 1863, in *McCall* v. *McDowell* (1 Abb., 212; Fed. Cas. No. 8673), Judge Deady took occasion to follow approvingly Chief Justice Taney, saying:

> When the occasion arises—a rebellion or invasion—whether "the public service" requires the suspension of the writ or not is confided to the judgment of Congress, and

> their action in the premises is conclusive upon all courts and persons [citing *Ex parte Merryman* and Story on the Constitution] * * * That proclamation [an earlier one, of September 24, 1862 (13 Stat., 735)] professes to suspend the writ of habeas corpus and to declare martial law. The expression martial law may be past over as merely cumulative. It means nothing but the absence of law. But the President of the United States has no authority to suspend the privilege of the writ, except as authorized.

But Judge Deady also says that Congress may suspend directly or may commit the matter within the proper limits to the President, and, sustaining the power of Congress and the authority of the President under the act of 1863, he says:

> The suspension enables the Executive, without interference from the courts or the law, to arrest and imprison persons against whom no legal crime can be proved, but who may, nevertheless, be effectively engaged in forming the rebellion or inviting the invasion to the iminent danger of the public safety.

The exigency of the rebellion had been determined by the flagrant fact and appeared on the face of the act; but there can be no doubt that in the learned judge's opinion the "proper limits" included the right of the President to determine whether the public safety required suspension.

Ex parte Field (5 Blatchf., 63; Fed. Cas. No.

4761) took the view with reference to the proclamation of 1862 that the President could validly act without previous authority from Congress, relying on *Martin* v. *Mott* and *Luther* v. *Borden* and treating *Ex parte Bollman* and *Ex parte Merryman* as not conclusive. To the same effect was *Re Dugan* (6 D. C., 131), which held that the power to suspend the writ under the Constitution is executive.

What the Chief Justice said in *Ex parte Bollman* was that the first Congress of the United States, sitting under a Constitution which contained the provision about habeas corpus, must have felt peculiarly the obligation of providing efficient means by which the great constitutional privilege should receive life and activity, and under the impression of this obligation they had given to all the courts the power of awarding the writ; and that (4 Cr., 101)—

> If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends upon political considerations on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty and must obey the laws.

Cooley thus comments on the matter:

> It is competent also and sometimes necessary to confer authority on the Executive or

> the judiciary to determine in what cases a particular law shall be applied. For example, the act of Congress suspending the privilege of the writ of habeas corpus during the late civil war did not declare a general suspension—which would have been entirely needless and therefore an act of tyranny—but it empowered the President to exercise his judgment and supersede the writ in particular cases as he might deem the public interest to require. A similar discretionary power is conferred upon the President, or upon one of the heads of department, in many cases. (Const. Law, pp. 111–112.)

It was held in *In re Kemp* (16 Wis., 359–367) that "the President has no power in the sense of the ninth section of the first article of the Constitution of the United States to suspend the privilege of the writ of habeas corpus. It is, in my judgment, a legislative and not an Executive act, and the power is vested in Congress. Upon this question it seems to me that the reasoning of Chief Justice Taney in *Ex parte* Merryman is unanswerable."

This case arose before the act of 1863 was past.

In *In re Oliver* (17 Wis., 703, *ut supra*) the court exprest great doubt whether the power to determine whether the emergency has arisen when the privilege may be suspended is not one of those essential trusts confided to the legislature which can not be delegated, but reached the conclusion that "altho this act [of 1863] professes to confer

on the President authority to suspend the privilege of the writ whenever in his judgment the public safety should require it during the present rebellion, yet that it is itself an expression of the legislative judgment that the time has already arrived when the public safety requires the legislature to provide for a suspension, and that it does provide for a suspension, not absolute, but to take effect according to the judgment of the President whether the authority conferred should be exercised in particular cases or not. * * * Altho the language of the act as it now is affords * * * ground for a mere verbal argument that it was an attempt to transfer the entire legislative function to the executive, its real substance and effect are the same as they would have been in the form supposed. The law itself suspends the right in those cases where the President in the exercise of the discretion conferred upon him elects to have it suspended."

Now, as to *Ex parte Milligan* (4 Wall., 2), the stress of that decision rests upon an entirely different matter. The point adjudged was that a resident of a loyal State where the Federal courts were meeting and peacefully transacting their business could not constitutionally be tried and punished by a military commission; that the habeas corpus act of 1863 itself (secs. 2 and 3) forbade this and gave the Circuit Court for Indiana complete jurisdiction to adjudicate the case; that therefore the writ was properly issued and the

petitioner must be discharged. This is what the court said as to the suspension of the writ:

> The public safety required that the privilege of the writ of habeas corpus should be suspended. The President had practically suspended it and detained suspected persons in custody without trial. But his authority to do this was questioned. * * * It was of the highest importance that the lawfulness of the suspension should be fully established. It was under these circumstances * * * that this law was past. The President was authorized by it to suspend the privilege of the writ of habeas corpus whenever in his judgment the public safety required, and he did, by proclamation bearing date the 15th of September, 1863, reciting among other things the authority of this statute, suspend it. The suspension of the writ does not authorize the arrest of anyone, but simply denies to one arrested the privilege of this writ in order to obtain his liberty.
>
> It is proper, therefore, to inquire under what circumstances the courts could rightfully refuse to grant this writ and when the citizen was at liberty to invoke its aid.
>
> The second and third sections of the law are explicit on these points. The language used is plain and direct and the meaning of the Congress can not be mistaken. The public safety demanded, if the President thought proper to arrest a suspected person, that he should not be required to give the cause of his detention on return to a

writ of habeas corpus; but it was not contemplated that such person should be detained in custody beyond a certain fixed period unless certain judicial proceedings known to the common law were commenced against him. * * * Not one of these safeguards [of the Constitution] can the President or Congress or the judiciary disturb, except the one concerning the writ of habeas corpus.

It is essential to the safety of every government that in a great crisis, like the one we have just past thru, there should be a power somewhere of suspending the writ of habeas corpus. * * * In the emergency of the times an immediate public investigation according to law may not be possible, and yet the peril to the country may be too imminent to suffer such persons [enemies of the Government counseling resistance] to go at large. Unquestionably there is then an exigency which demands that the Government, if it should see fit in the exercise of a proper discretion to make arrests, should not be required to produce the persons arrested in answer to a writ of habeas corpus. The Constitution goes no further. It does not say, after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of the common law. * * *

The two remaining questions in this case must be answered in the affirmative. The suspension of the privilege of the writ of habeas corpus does not suspend the writ

itself. [See also on this point *Re Fagan* (2 Sprague, 91); *Re Dunn*, (25 How. Pr. 467).] The writ issues as a matter of course, and on the return made to it the court decides whether the party applying is denied the right of proceeding further with it (pp. 115, 125–126, 130–131).

The concurring opinion emphasizes the view that Milligan's right to the writ came within the precise letter and intent of the act of Congress. "The express terms of the act of Congress required this action of the court."

> The first section of the act authorized the suspension of the writ of habeas corpus generally thruout the United States. The second and third sections limited this suspension in certain cases within States where the administration of justice by the Federal courts remained unimpaired. In these cases the writ was still to issue and under it the prisoner was entitled to his discharge by a circuit or district judge or court, unless held to bail for appearance to answer charges. No other judge or court could make an order of discharge under the writ. Except under the circumstances pointed out by the act, neither circuit nor district judge or court could make such an order. But under those circumstances the writ must be issued and the relief from imprisonment directed by the act must be afforded. The commands of the act were positive and left no discretion to court or judge. * * *
>
> We assent fully to all that is said in the

> opinion of the inestimable value of the trial by jury, and of the other constitutional safeguards of civil liberty. And we concur also in what is said of the writ of habeas corpus, and of its suspension, with two reservations: (1) That, in our judgment, when the writ is suspended, the Executive is authorized to arrest as well as to detain; and (2) that there are cases in which the privilege of the writ being suspended, trial and punishment by military commission, in States where civil courts are open, may be authorized by Congress, as well as arrest and detention (pp. 135, 137).

It is thus clear, both from the opinion of the court and from the concurring opinion, that the condemnation of the court is directed against the imposition of martial law and the trial of civilians by military commissions in peaceful districts, altho' war is elsewhere flagrant; and that Milligan's right to the writ and his right to be discharged under it rested upon the express provisions of the very law which authorized the President to suspend the writ. The court recognize the power to suspend the writ as fully as the right of trial by jury, and intimate nothing against the power of Congress or the authority of the President in the matter. No argument can be based on the *Milligan* case which is adverse to the Government contentions in the present case.

As to later cases—

The constitution of Idaho provides that "the

privilege of the writ of habeas corpus shall not be suspended unless in cases of rebellion or invasion the public safety requires it, and then only in such manner as shall be prescribed by law." (Art. I, sec. 5.) No law appears to have been enacted prescribing the manner in which the writ should be suspended, but an act was past (sec. 5164, Penal Code; 1887 R. S., sec. 7406, 1st sess., p. 240, sec. 46) giving the governor the authority to proclaim an insurrection in any county when he is satisfied that the execution of civil or criminal process has been forcibly resisted by bodies of men. The Supreme Court of the State held (*In re Boyle*, 45 L. R. A., 832) that such a proclamation imposed martial law and suspended habeas corpus, and that the governor's action would not be inquired into or reviewed. Exactly the opposite conclusion was reached in *Ex parte Moore* (64 N. C., 802); but the constitution of North Carolina provides that "The privilege of the writ of habeas corpus shall not be suspended," and it was held that such express provision could not be abrogated and made of no force by an implication from any other provision.

It seems clear from this review that the great names of Marshall and Taney are authority for the contention that Congress itself must judge of all the exigencies, must determine the fact of invasion or rebellion, and must say when the public safety requires the action. But perhaps their declarations mean no more than that Congress must authorize and that the Executive can not act with-

out some authority from Congress. In *Ex parte Bollman* the matter was not presented at all, and in *Ex parte Merryman* the President had acted without any authority whatever from Congress. On the other hand, proceeding under this authority, the power of the President has been sustained where the face of the act expressly authorizes him to determine in his sole discretion whether the public safety requires action. This is the undoubted effect of *Milligan's* case and the other authorities which have considered the act of 1863. It may indeed be suggested that if there is an enabling statute, either in some existing emergency or for one contemplated to arise, and the President may constitutionally determine the exigency of the public safety, he may with equal right determine whether the progress of a rebellion or threat of an invasion presents a degree of danger which creates the constitutional occasion. At all events, the subject may be digested as follows, and, I submit, accurately:

It has been declared and held that the President may not suspend the privileges of the writ of habeas corpus without the authority of an act of Congress. It has been decided that, so authorized, he may determine at his discretion whether the public safety requires suspension and suspend the writ accordingly.

It has not been decided that, so authorized, he may not determine whether the exigency of invasion or rebellion has arisen. There can be no

doubt of the intent of the act for the Philippines, and it is not subject to the precise limitations of the constitutional provision. It adopts and applies to the Philippines the vital spirit and meaning of the constitutional provision.

The question noted at the outset thus practically becomes the question whether the act is constitutional. The answer is in the affirmative. The statute is consistent with the Constitution, because the exact limitation of the Constitution does not apply to the Philippines, and because Congress in thus legislating acted under the constitutional power conferred upon it "to make all needful rules and regulations respecting the territory or other property belonging to the United States."

Governor Wright's proclamation of January 31, 1905, was revoked as soon as that step could safely be taken. His proclamation of October 19, 1905, declares:

> Whereas the ladrone bands which up to a recent date infested the provinces of Cavite and Batangas have been practically destroyed and the members thereof killed or captured or have surrendered, so that the necessity for the continuance of the suspension of the writ of habeas corpus in the aforesaid provinces which was made necessary by the conditions prevailing on the thirty-first day of January last no longer exists:
>
> Now, therefore, I, Luke E. Wright, governor-general of the Philippine Islands, be-

> ing duly authorized and empowered thereto by the Philippine Commission, do hereby proclaim the revocation of the suspension of the writ of habeas corpus in the provinces of Cavite and Batangas which was made by me on the thirty-first day of January last.

If the application herein had been renewed after October 19, 1905, and denied, or if the writ had been granted and then dismissed, that determination would necessarily have proceeded on other grounds than the suspension of the writ, and the present case would have died from inanition.

Is there not, then, a mere moot question here, which the court will decline to consider under well-settled precedents? (*California* v. *San Pablo and Tulare R. R.* 149 U. S., 308, 314; *Mills* v. *Green* 159 U. S., 651, 653; *Kimball* v. *Kimball* 174 U. S., 158, 161; *Codlin* v. *Kohlhausen* 181 U. S., 151.)

I beg to submit that the writ of error must be dismissed for want of jurisdiction, or because the inquiry is now merely a moot point; or that the judgment below must be affirmed.

HENRY M. HOYT,
Solicitor-General.

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Supreme Court of the United States.

No. 214.—October Term, 1906.

Fred C. Fisher and Charles C. Cohn, on behalf of Felix Barcelon, Plaintiffs in Error, *vs.* Colonel David J. Baker, Jr., and Captain John Doe Thompson.	In error to the Supreme Court of the Philippine Islands.

[December 3, 1906.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

Application for the writ of *habeas corpus* was made to the Supreme Court of the Philippine Islands, August 2, 1905, on behalf of one Barcelon, seeking to be discharged from alleged illegal detention in the province of Batangas. An order to show cause was granted, returnable August 4, to which return was made, the cause heard and the application denied on the ground that the writ of *habeas corpus* had been suspended and that the action of the Philippine authorities in that regard was not open to judicial review.

Petition for the allowance of a writ of error from this court, dated October 19, and service of copy thereof acknowledged by respondents the same day, was filed January 3, 1906, and the writ of error thereupon allowed and issued on that day.

The second clause of section 9 of article I of the Constitution of the United States provides: "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

The seventh paragraph of section 5 of the act of Congress of July 1, 1902, 32 Stat. c. 1369, pp. 691, 692, reads: "That the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the Governor, with the approval of the Philippine Commission, wherever during such period the necessity for such suspension shall exist."

The record discloses that on January 31, 1905, the Philippine Commission adopted the following resolution:

"Whereas certain organized bands of ladrones exist in the provinces of Cavite and Batangas who are levying forced contributions upon the people, who frequently require them under compulsion to join their bands, and who kill or maim in the most barbarous manner those who fail to respond to

their unlawful demands and are therefore terrifying the law-abiding and inoffensive people of those provinces; and

"Whereas these bands have in several instances attacked police and constabulary detachments and are in open insurrection against the constituted authorities; and

"Whereas it is believed that these bands have numerous agents and confederates living within the municipalities of the said provinces; and

"Whereas, because of the foregoing conditions, there exists a state of insecurity and terrorism among the people which makes it impossible in the ordinary way to conduct preliminary investigations before justices of the peace and other judicial officers:

"Now, therefore, be it resolved, That, the public safety requiring it, the Civil Governor is hereby authorized and requested to suspend the writ of *habeas corpus* in the provinces of Cavite and Batangas."

Whereupon, on the same day, the Civil Governor issued the following proclamation:

"Whereas certain organized bands of ladrones exist in the provinces of Cavite and Batangas who are levying forced contributions upon the people, who frequently require them under compulsion to join their bands, and who kill or maim in the most barbarous manner those who fail to respond to their unlawful demands and are therefore terrifying the law-abiding and inoffensive people of those provinces; and

"Whereas these bands have in several instances attacked police and constabulary detachments and are in open insurrection against the constituted authorities, and it is believed that the said bands have numerous agents and confederates living within the municipalities of the said provinces; and

"Whereas, because of the foregoing conditions, there exists a state of insecurity and terrorism among the people which makes it impossible in the ordinary way to conduct preliminary investigations before justices of the peace and other judicial officers:

"In the interest of the public safety, it is hereby ordered that the writ of *habeas corpus* is from this date suspended in the provinces of Cavite and Batangas."

But we must take notice of the fact that on October 19, 1905, the Civil Governor issued a proclamation revoking that of January 31, 1905, as follows:

"Whereas the ladrone bands which up to a recent date infested the provinces of Cavite and Batangas have been practically destroyed and the members thereof killed or captured or have surrendered, so that the necessity for the continuance of the suspension of the writ of *habeas corpus* in the aforesaid provinces which was made necessary by the conditions therein prevailing on the thirty-first day of January last no longer exists:

"Now, therefore, I, Luke E. Wright, Governor General of the Philippine Islands, being duly authorized and empowered thereto by the Philippine Commission, do hereby proclaim the revocation of the suspension of the writ of *habeas corpus* in the provinces of Cavite and Batangas which was made by me on the thirty-first day of January last."

This proclamation wiped out the basis of the decision sought to be reviewed on the day when the copy of the petition for writ of error was served on opposing counsel, and more than two months before the writ of error was issued. The question ruled by the court below and solely argued before us became in effect a moot question, not calling for determination here. *Mills* v. *Green*, 159 U. S. 651.

But the disposition of this writ of error must be rested on another ground. The proceeding is in *habeas corpus*, and is a civil and not a criminal proceeding. *Cross* v. *Burke*, 146 U. S. 82, 88. Section 10 of the Philippine Act of July 1, 1902, 32 Stat. c. 1369, pp. 691, 695, provides:

"That the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the Supreme Court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved, or in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, reversed, modified, or affirmed by said Supreme Court of the United States on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the Circuit Courts of the United States."

Final orders of the Circuit or District Courts of the United States in *habeas corpus* can only be reviewed by appeal and not by writ of error. *In re Morrissey*, 137 U. S. 157, 158; *Rice* v. *Ames*, 180 U. S. 371, 373. In the latter case the court said:

"Motion is made to dismiss the appeal upon the ground that there is no provision of law allowing an appeal in this class of cases. Prior to the Court of Appeals Act of 1891, provision was made for an appeal to the Circuit Court in *habeas corpus* cases 'from the final decision of any court, justice or judge inferior to the Circuit Court,' Rev. Stat. sec. 763; and from the final decision of such Circuit Court an appeal might be taken to this court. Rev. Stat. sec. 764, as amended March 3, 1885, c. 353, 23 Stat. 437.

"The law remained in this condition until the Court of Appeals Act of March, 1891, was passed, the fifth section of which permits an appeal directly from the District Court to this court 'in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.' In this connection the appellee insists that an appeal will not lie, but that a writ of error is the proper remedy. In support of this we are cited to the case of *Bucklin* v. *United States*, 159 U. S. 680, in which the appellant was convicted of the crime of perjury, and sought a review of the judgment against him by an appeal, which we held must be dismissed, upon the ground that

criminal cases were reviewable here only by writ of error. Obviously that case has no application to this, since under the prior sections of the Revised Statutes, above cited, which are taken from the act of 1842, an *appeal* was allowed in *habeas corpus* cases. The observation made in the *Bucklin* case that 'there was no purpose by that act to abolish the general distinction, at common law, between an appeal and a writ of error,' may be supplemented by saying that it was no purpose of the act of 1891 to change the forms of remedies theretofore pursued. *In re Lennon*, 150 U. S. 393; *Ekiu* v. *United States*, 142 U. S. 651; *Gonzales* v. *Cunningham*, 164 U. S. 612."

Writ of error dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.